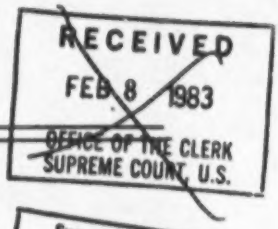
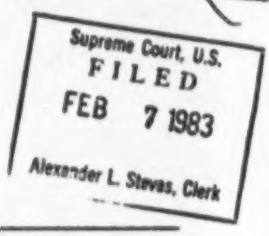
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82-6187





ROY ALLEN STEWART

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE IMPOSITION UPON THE PETITIONER OF THE DEATH SENTENCE AND ITS AFFIRMANCE BY THE SUPREME COURT OF FLORIDA VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CONFLICT WITH THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586 (1978) AND EDDINGS V. OKLAHOMA ___ U.S. ___ (1982) WHERE: (1) THE TRIAL COURT'S REFUSAL TO CONTINUE THE SENTENCING HEARING TO ORDER A PROPER PSYCHOLOGICAL EVALUATION, OR TO ORDER A PRESENTENCE INVESTIGATION PRECLUDED CONSIDERATION OF ALL EVIDENCE RELEVANT TO THE IMPOSITION OF SENTENCE; AND (2) THE TRIAL COURT'S ADMISSION, OVER OBJECTION, OF EVIDENCE OF PETITIONER'S PRIOR CRIMINAL RECORD OF NONVIOLENT OFFENSES TO REBUT A MITIGATING CIRCUMSTANCE RESULTED IN THE ARBITRARY IMPOSITION OF THE DEATH PENALTY.

II.

WHETHER THE AFFIRMANCE OF THE SENTENCE OF DEATH BY THE SUPREME COURT OF FLORIDA DENIED PETITIONER THE MEANINGFUL APPELLATE REVIEW CONTEMPLATED BY PROFFITT V. FLORIDA, 428 U.S. 242 (1976) AND RESULTED IN THE ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH SENTENCE.

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OCTOBER TERM, 1981

NO.

ROY ALLEN STEWART,

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-vs-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner ROY ALLEN STEWART respectfully urges that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida rendered on November 9, 1982.

OPINION BELOW

The full opinion of the Supreme Court of Florida is attached as part of Petitioner's Appendix. (App. 1-4). The reported opinion appears at 420 So.2d 862.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), to review the judgment and opinion of the Supreme Court of Florida. That judgment and opinion was entered on August 26, 1981. (App. 1-4). A timely petition for rehearing was denied on November 9, 1982. (App. 1). An order extending the time for the filing of this Petition up to and including February 7, 1983, was entered by the Honorable Justice Powell on December 30, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Florida Law set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder, robbery, sexual battery, and burglary in the Circuit Court of the Eleventh Judicial Circuit of Florida on July 2, 1979, and he was sentenced to death on July 5, 1979.

At arraignment on May 8, 1979, defense counsel moved the trial court for appointment of three experts to conduct psychiatric evaluations. (App. 8-9). The court appointed only one expert; Dr. Jacobson reported that the petitioner was examined "to determine his competency for legal proceedings" and concluded that the petitioner was competent to stand trial. (App. 25-31).

On May 22, defense counsel informed the court that Dr. Jacobson's report was inadequate for capital defense purposes; the trial court agreed:

* * *

> THE COURT: Today is the day for the hearing as to whether or not Mr. Stewart is competent to stand trial.
>
> However, I do think that the report admits the question of whether or not he knew right from wrong at the time of the offense.
>
> [DEFENSE COUNSEL]: And, that is something else. My client is indigent. I have been appointed here. I would like to have him re-evaluated as to Doctor Jacobson, at the time of his mental condition at the time of the incident, and at least two other doctor's along with Doctor Jacobson to evaluate him as to any mental difficulty or emtional conditions which may be relevant to statutory or non-statutory mitigating circumstances, which could be used irrelevant [sic] at the time of sentencing.
>
> I need a full report on that, because the issue is going to come up as mitigating circumstances, and I have no means or funds to hire doctors to examine him. I would appreciate and request, that the Court, at this time, in addition to Doctor Jacobson's re-examination, to appoint two more doctors and have him examined further.

* * *

(App. 12-13). (e.s.).

The court stated that it would order Dr. Jacobson to report "as to whether or not the defendant knew right from wrong at the time of the offense" and Doctors Jaslow and Corwin to report

"whether the defendant is competent to stand trial and whether he knew right from wrong at the time of the offense." (App. 13-14.)

Despite defense counsel's reminder as to the need for further information, the court rejected counsel's request for an order specifically directing the doctors to evaluate petitioner as to factors relevant to capital sentencing. (App. 15).

The trial court's consequent order directed the doctors to file, inter alia, a "[g]eneral report of the mental condition of the Defendant." (App. 16).

On May 31, 1979, the competency hearing was postponed because Dr. Jaslow's report had not yet been filed.[1] (App. 18-19). On June 8, 1979, the parties stipulated to the reports of the three medical experts who found, as did the trial court that petitioner was competent to stand trial and sane at the time of the offense.[2] (App. 44)

Although no mention of "mental mitigating factors" was again made, it is significant that each doctor's report contains highly suggestive comments as to Petitioner's mental condition, and each doctor expressed the desire for further facts or examination of the Petitioner.[3]

On the morning scheduled for the penalty phase in this case, July 5, 1979, defense counsel orally and in writing, moved the court for an additional mental evaluation and for a continuance of the sentencing proceeding on the grounds that, under the circumstances, it had been impossible for them "to devote any significant time to what was still not a reality, namely the penalty phase;" that they had only approximately seven weeks to

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[1] On that date, the trial court denied the defense request for an expert in dental forensics as premature; defense counsel had not re-subpoenaed the state's dental expert because had not Dr. Souviron yet reached a conclusion as to the bitemark evidence in this case. The prosecutor noted, "Ninety-five percent of the people set for deposition did not show up." (App. 24).

[2] The trial court then appointed a dental expert to assist the defense in preparing for the state's bitemark evidence through Dr. Souviron.

[3] The reports of the medical experts are contained in the appendix. Additional facts are set forth in this petition, infra, at 7-11.

prepare for trial and sentencing; that "the trial in this cause included several complex issues, including an issue of first impression, namely expert testimony on bite mark evidence" that they did "all that was humanly possible" to prepare for sentencing in the two days (including the Fourth of July) since the guilt phase ended; that preparation for sentencing (and trial) had been made more difficult by the fact that the defendant grew up in South Carolina, and most of his family still resided there; that although defense counsel had "talked to one sister on the phone" two times regarding scheduling, he had not talked to any relatives in relation to sentencing-related facts until that day; and that no psychiatric evaluation had been performed regarding considerations relevant to capital sentencing mitigating factors. (App. 48-64).

The trial court denied the motion for continuance of the penalty phase, finding that defense counsel did an "excellent job at the trial;" the trial court denied the motion for mental evaluation for purposes of penalty proceeding, finding that the petitioner had been amply evaluated. (App. 65-66).

Prior to the taking of testimony at the sentencing hearing, the prosecutor expressed his intent to introduce evidence that petitioner had previously been convicted of two nonviolent offenses, burglary and larceny; the purpose was not to prove an aggravating circumstance, "but simply to negate mitigating circumstance number one, which is that the defendant has no significant history of prior criminal activity." (App. 67-68).The court overruled defense counsel's objection that evidence of nonviolent crimes should not be brought before the jury. (App. 67, 70). The court similarly overruled counsel's objection to the state's closing arguments regarding the nonviolent crimes and their negation of the mitigating circumstance. (App. 72).

After the jury returned its advisory verdict recommending the death sentence, defense counsel renewed the request for an additional psychiatric evaluation and for a presentence invetigation; these motions were denied. (App. 73-73A).

The trial court then imposed the death sentence, finding that the aggravating circumstances specified in Sections 941.141(5)(a),(b),(d),(f) and (h), Florida Statutes (1977) were applicable, and finding no mitigating circumstances. (App. 73A). The trial court filed its written findings on July 27, 1979. (App. 74-80).

On direct appeal, the Supreme Court of Florida found no abuse of discretion in the trial court's failure to grant a continuance nor a denial of effective assistance of counsel. (App. 1-4). That court held that petitioner was not denied effective assistance of counsel despite its own precedents holding that such a claim is a collateral matter which should be addressed through a motion for post-conviction relief. (App. 3).

In affirming the trial court's refusal to order a further mental evaluation, the Supreme Court of Florida stated that the defense could have called the examining psychiatrists to testify if they had formed an opinion regarding the applicability of the statutory mental mitigating factors to Petitioner. (App. 3). The Supreme Court of Florida rejected all of Petitioner's attacks upon his death sentence. (App. 3-4).

A timely motion for rehearing and/or relinquishment of jurisdiction (App. 5-7) was denied on November 9, 1982.

REASONS FOR GRANTING THE WRIT

The sentence of death was imposed upon Roy Allen Stewart in contravention of fundamental constitutional principles. In affirming the death penalty in this case, the Supreme Court of Florida denied the petitioner the meaningful appellate review to which he is constitutionally entitled.

I.

THE IMPOSITION UPON THE PETITIONER OF THE DEATH SENTENCE AND ITS AFFIRMANCE BY THE SUPREME COURT OF FLORIDA VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND CONFLICT WITH THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586 (1978) AND EDDINGS V. OKLAHOMA U.S. (1982) WHERE: (1) THE TRIAL COURT'S REFUSAL TO CONTINUE THE SENTENCING

HEARING, TO ORDER A PROPER PSYCHOLOGICAL EVALUATION, OR TO ORDER A PRESENTENCE INVESTIGATION PRECLUDED CONSIDERATION OF ALL EVIDENCE RELEVANT TO THE IMPOSITION OF SENTENCE; AND (2) THE TRIAL COURT'S ADMISSION, OVER OBJECTION, OF EVIDENCE OF PETITIONER'S PRIOR CRIMINAL RECORD OF NONVIOLENT OFFENSES TO REBUT A MITIGATING CIRCUMSTANCE RESULTED IN THE ARBITRARY IMPOSITION OF THE DEATH PENALTY.

(1)

The basic thrust of this Court's sentencing decisions has been to minimize the risk of arbitariness in the imposition of a death sentence. See, Proffitt v. Florida, 428 U.S. 242 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Godfrey v. Georgia, 446 U.S. 420 (1980); Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869 (1982).

The Eighth amendment "calls for a greater degree of reliability" in the death-sentencing process than is required in other criminal proceedings Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964 (1978); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 1205 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This requirement is enforced by focusing the death sentencing process on "the particularized circumstances of the individual offense and the individual offender". Jurek v. Texas, 428 U.S. 262, 274 (1976). An "individualized decision" to impose the death penalty is therefore mandated by the Eighth Amendment. Lockett v. Ohio, supra at 2965.

An "individualized decision" contemplates a "character analysis of the defndant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). It is therefore "constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant" who is subject to the death penalty. Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976). Accord, Proffitt v. Florida, 428 U.S. 252 (1976). The sentencing process must provide for full consideration of the "character and record of the individual offender," and "allow for full consideration of whatever mitigating circumstances may be relevant" to that person. Lockett v. Ohio, supra at 2963;

Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1933, 1996 (1977); Woodson v. North Carolina, supra, at 304.

To ensure that all relevant evidence is presented, capital defendants are granted the right to present such evidence at sentencing proceedings. State v. Dixon, 238 So.2d 1, 7 (Fla. 1973). This right guarantees the defendant "a meaningful opportunity to be heard" on matters relevant to the determination of sentence. Barclay v. State, 362 So.2d 657, 658 (Fla. 1978). Accordingly, the protections which surround the sentencing process guarantee the effective assistance of counsel; counsel must be given "an opportunity to comment on facts which may influence the sentencing decision." Gardner v. Florida, supra at 1206.

The entire structure of Eighth Amendment protections crumbles if counsel is not given an opportunity to investigate and present relevant mitigating evidence. Counsel for petitioner in this case had no opportunity to investigate mitigating evidence and to present such evidence at the sentencing hearing, and the refusal of the court to provide petitioner with access to any other sources of possible mitigating factors denied the petitioner a meaningful opportunity to be heard at the proceeding in which he was sentenced to death.

In this case, the trial court refused to grant a continuance of the penalty hearing despite defense counsel's assertions that they were not prepared because of the extensive investigation and preparation they had done for the guilt phase, which included considerable expert testimony regarding the state's bitemark evidence; that the petitioner's immediate family resided in South Carolina, and they had just arrived the night before; that the three psychiatrists who evaluated the petitioner prior to trial had not examined him as to statutory and non-statutory mitigating factors; and that it would be helpful for an expert to talk with the petitioner's family about his background and history of drug abuse.

The court denied the defendant's motions, stating the following:

> Insofar as the Motion for Continuance of the death penalty proceeding is concerned, filed by the defendant, the Court makes the folowing findings: originally, I appointed Mr. Stanley Goldstein to represent the defendant on or about May 1st, 1979. Shortly thereafter, he asked for the association of Mr. Thomas Sherman, which I authorized and permitted. Therefore, there are two attorneys working on the case for over a month. I supposed [sic] that most attorneys would always like to be better prepared for a case, no matter how much time they had. However, I offered Mr. Goldstein and Mr. Sherman, by latitudes [sic] insofar as the hiring and payment costs of the investigators, despositions. I feel that they eminently prepared and I commend their thorough trial conduct. They cross-examined each and every witness properly, in my opinion, and I think they did an excellent job at the trial.
>
> Therefore, the Motion for Continuance is denied.
>
> The motion for the psychiatric evaluation for the defendant for purposes of the penalty proceedings, as has been previously pointed out on the report of the defendant, the defendant has been examined on three occasions or more by Drs. Jacobson, Corwin, and Jaslow. At all times the consensus of the doctors' opinions was that the defendant, at the time of the alleged offense and any time thereafter, had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.
>
> I feel that there has been ample amounts of work and time that has gone to the evaluation of the defendant, and therefore, the motion for psychiatric evaluation is denied.

(App. 65-66).

With regard to the denial of the motion for continuance, the trial court unreasonably decided that counsel's "excellent" performance during the guilt phase of trial meant that they were prepared, notwithstanding their protestations, for the penalty phase of trial.

As to the court's refusal to order the requested psychological evaluation, it is clear that the court's finding that "the consensus of the doctors' opinions was that the defendant, ..., had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law" is without support in the record.[4] Only

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[4] The quoted language tracks one of the statutory mitigating (Cont.)

Dr. Jacobson's report contains such language and, when read in context, it is apparent that his language was not intended to carry the meaning which the court ascribed to it. Dr. Jacobson concluded his report with language that clearly expresses his intent to comment solely as to whether Petitioner was "sane," i.e. legally responsible for his acts:

> If additional information were available regarding the defendant's behavior at the time of the alleged offense, it is possible that this additional information might alter the opinion expressed regarding his ability to meet the test for criminal responsibility. However, in the absence of such information, I would have to render the opinion noted previously.

(App. 25-33). (e.s.).

Thus, it is obvious that Dr. Jacobson's use of the term "substantial capacity . . ." was a professional hedging as to petitioner's insanity, rather than a positive statement as to the statutory mitigating circumstance.

More important to petitioner's claims are the comments of the doctors as to petitioner's mental condition; significantly, each doctor expressed the desire for further facts or examination of the petitioner.

In particular, Dr. Jaslow's report (App. 39-42) indicates that defendant had told him he was a heavy user of alcohol and drugs, had experienced hallucinations, had attempted suicide, has suffered amnesia as a result of a concussion sustained in an auto accident, and had a tendency to "go crazy" if somebody hit him, particularly in the face or head. Defendant also told Dr. Jaslow that he had suffered a "blackout" after striking Ms. Haizlip.[5] Dr. Jaslow's medical conclusions included the following:

> On more direct mental status evaluation the patient was well-oriented, fund of information seemed to be adequate, and mental faculties seemed to be adequate in general. There were no overt indications of organic brain involvement, although the history that he described would suggest various possibilities that certainly should be evaluated through additional examination and investigation. His exposure to inhalants in

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circumstances. Sec. 921.141(6)(f).

[5] Each of the doctors reported that Petitioner had informed them of this "blackout." (App. 28,36,41).

early years, and the extensive use of alcohol and drugs, the claim of the head injury with periods of amnesia and the alleged rage reaction would certainly suggest that there could be additional factors that should be considered on an organic basis.

* * *

It would perhaps be worthwhile to attempt to investigate and document prior history of such "rage reaction" as have [sic] been described, and see whether there have been episodes of extreme violence and brutality without the awareness or recollection of the patient as far as others could determine. Organic investigations, as have been suggested earlier, could perhaps show such things as alteration of EEG patterns, particularly while under the influence of such things as alcohol or drugs or both. (App. 41-42). (e.s.).

Dr. Jacobson's report also contained interesting observations:

Mental status examination at this time revealed a well developed, adequately nourished young man. He was quiet and cooperative, spoke softly and the general impression was in marked contrast of the violence and aggression that would be indicated by the charges against him. There are no auditory, visual or tactile hallucinations at this time. He has intermittently experienced hallucinations in the past related to his multiple drug and alcohol abuses.

At this time, he is not hositle, agressive or suspicious, however, it is clear the he can become defensive and angry. He describes having difficulties of this type in various situations in the past.

However, he does not display it at this time. He seems saddened and to some degree remorseful. His anxiety level is in acceptable limits.

* * *

Psychological testing responses revealed elements of depression and considerable difficulties in interpersonal relationship. The findings are consistent with the clinical interview and with his previous history of drug abuse.

(App. 29-30). (e.s.).

Dr. Jacobson concluded his report by expressing a concern for additional information regarding Petitioner's behavior at the time of the offense, which information might alter his finding that the Petitioner was "sane." (App. 32-33).

Similarly, Dr. Corwin's report includes the following impressions:

> I believe that he is suffering from a personality disorder, with chronic alcoholism and drug abuse as factors. I do not believe that he is grossly psychotic at this time. It is my opinion that he is presently capable of properly answering the charges against him and aid in his own defense and stand trial. With references to his ability to know right from wrong or the nature and consequences of his acts, it appears that, if he is to be believed, that he was under the influence and [sic] drugs, but that he had a clear recollection of events leading up to the time when he slapped her. His subsequent claim of not recalling details during the following 15 or 20 minutes may be tied to an explosion of rage and anger. Nevertheless I must consider him to be capable of distinguishing between right and wrong and knowing the nature and consequences of his acts. In theory it would be to his advantage to have appropriate treatment for his alcohol and drug problem, preferably in a structured in-patient treatment center. It would also be of interest to have neurological studies including electroencephalogram.

(App. 37-38). (e.s.).

The above-quoted samples from the doctors' reports clearly indicate the presence of, at the very least, non-statutory mitigating factors; moreover, on a fair reading, the reports clearly suggest that further, properly directed evaluation might well uncover the presence of statutory mitigating factors. Had the court honored defense counsel's request to specifically order the psychiatrists to reach conclusions as to these mitigating factors, further evaluation would have been unnecessary. A court should not be allowed, even unintentionally, to "sandbag" a defendant, particularly in a capital case, by disregarding his requests for essential specific information as to mitigating factors, and then ruling that the resultant reports addressed to the questions of "competency" and "sanity" render further reports unnecessary. The Supreme Court of Florida has recognized that there is a clear distinction between these two types of evaluations. See Clark v. State, 379 So.2d 97, 104 (Fla. 1979); Magill v. State, 386 So.2d 1188, 189 (Fla. 1980). Moreover, expert opinions regarding the mitigating circumstances are highly relevant to the determination of sentence, Messer v. State, 330 So.2d 137, 142 (Fla. 1976) and under circumstances such as in this case, the court must allow them to be presented to the jury even though a short continuance is necessary in order to secure

those opinions. Miller v. State, 332 So.2d 65, 67-68 (Fla. 1976); Valle v. State, 394 So.2d 1004, 1008-9 (Fla. 1981).[6]

While the granting of a continuance is within the sound discretion of a trial judge, that discretion is not unfettered; a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality". Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "Discretion" does not grant a court the power to act arbitrarily. Atkins v. State, 100 Fla. 897, 130 So. 273 (1930). Rather, the exercise of the discretion vested in a trial court in ruling on a motion for continuance requires that the court "take into account that whether a defendant be guilty or not, he is entitled to a fair and impartial trial, a necessary concomitant of which is sufficient time" to prepare for trial. Shepherd v. State, 108 So.2d 494, 496 (Fla. 1st DCA 1959).

The refusal to grant a continuance can constitute a denial of due process of law and the effective assistance of counsel. See, e.g. Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975); Sellers v. Smith, 412 F.2d 1002 (5th Cir. 1969); Voyles v. Watkins, 489 F.Supp. 901 (1980); State v. Myles, 389 So.2d 12 (La. 1980). The trial court's observation in the instant case that defense counsel had performed well during the trial phase misses the mark entirely; it was because of the necessity for extensive trial preparation, which preparation had been delayed by the actions of the court and the state, that counsel was not prepared for the

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[6] The nature of the "rage reaction" mental disorder suggested by the psychiatric reports is such that, if established, it would not only provide two statutory mitigating circumstances, but would also tend to lessen, if not entirely negate, the impact of that least two aggravating circumstances found by the lower court: that the capital felony was committed in the course of a sexual battery, and that the murder was heinous, atrocious, and cruel. In Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977) the Court recognized the importance of a mental disorder which establishes a "causal relationship between the mitigating and aggravating circumstances", so that an aggravating circumstance becames a "direct consequence of his mental illness." "The delicate system overlaid on any sentence of death would be seriously disrupted if the jury's recommendation or the judge's sentence were made without full knowledge regarding the defendant's psychiatric status. . . ." Id., at 35. (England, J. concurring in part and dissenting in part).

sentencing phase. Where counsel is not given sufficient time prior to trial to prepare for both the trial and sentencing phases, a continuance must be granted before the sentencing hearing in order to assure the effectiveness of counsel. Valle v. State, supra, at 1008.

"[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (citations omitted). The right to effective assistance requires the provision of "counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified 289 F.2d 928 (5th Cir. 1961), cert. denied 368 U.S. 877 (1961). Accord. Meeks v. State, 382 So.2d 673 (Fla. 1980). If effective assistance requires nothing else, it requires that defense counsel make a reasonable investigation into the facts of the case. Nelson v. State, 274 So.2d 256, 258 (Fla. 4th DCA 1973). Indeed, "a purported trial without adequate preparation amounts to no trial at all." Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967).

The prejudice to petitioner resulting from the trial court's refusal to allow the defense adequate time and resources[7] for the sentencing hearing is apparent. Although counsel did present lay testimony from petitioner's family regarding his emotional problems and use of alcohol and drugs, that evidence, in the absence of any formal psychiatric context, was greatly diminished in his mitigating force.

The cumulative effect of the lower court's rulings was to

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7 After the jury returned its recommendation as to sentence, defense counsel renewed his request for additional psychiatric evaluations, which request was denied on the grounds that the three psychiatrists "all say that he is competent and all say he knew right from wrong at the time of the offense". (App. 73-73A). Defense counsel's request for a presentence investigation was also denied. (App. 73A). Presentence reports, although not required in capital cases, see e.g. Hargrave v. State, 366 So.2d 1, 4 (Fla. 1978), "frequently contain much information relevant to sentencing." Proffit v. Florida, 428 U.S. 249 (1976). Accord Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 1205-6 (1977). The Supreme Court of Florida has explicitly recognized the value of such reports to the capital sentencing process. See Swan v. State, 322 So.2d 485, 488-9 (Fla. 1975); Songer v. State, 322 So.2d 481, 484 (Fla.

deny defendant an opportunity to present all relevant mitigating evidence to either the jury or the court, as well as to prevent him from effectively refuting the aggravating circumstances relied upon by the state. This "myopic insistence upon exxpeditiousness," Ungar v. Sarafite, 376 U.S. 575, 589 (1964), foreclosed the individualized sentencing process required by the Eighth Amendment.

(2)

In Maggard v. State, 399 So.2d 973 (Fla. 1981), the Supreme Court of Florida reversed a death sentence for the same error that occurred in this case.

In Maggard, the court upheld the finding of the trial court that no mitigating circumstances were present; at least one viable aggravating circumstance remained after the court's review. Nevertheless, the court found error in permitting the state to present, over objection, extensive evidence of Maggard's prior criminal record of nonviolent offenses to rebut the statutory mitigating circumstance of no significant prior criminal history. The court found the error of such magnitute as to require a new sentencing hearing. The court ruled:

> Mitigating facts are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist. Furthermore, the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the State nor the defendant should be allowed to argue to the jury the existence or the nonexistence of such mitigating circumstance.

Id., at 978.

In effect, then, the Supreme Court of Florida found that the state and the trial court impermissibly relied upon a non-statutory aggravating circumstance.

In this case, petitioner's counsel objected to the prosecution's intended use at the sentencing hearing of petitioner's previous convictions for two nonviolent offenses, burglary and theft. (App. 67, 70). The prosecutor intended

to introduce evidence of these convictions "simply to negate mitigating circumstance number one, which is that the defendant has no significant history of prior criminal activity." (App. 67-68). The court overruled defense counsel's objection and also overruled the same objection provoked when the prosecutor argued in closing the negation of that mitigating circumstance in closing arguments. (App. 70, 72).

By ignoring the Maggard issue in affirming petitioner's sentence of death, the Supreme Court of Florida departed from its essential role of ensuring "consistency, fairness and rationality in the evenhanded operation of the State law." Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). The Supreme Court of Florida's arbitrary imposition of the death sentence in the instant case violates the petitioner's Sixth, Eighth and Fourteenth Amendment rights.

II.

THE AFFIRMANCE OF THE SENTENCE OF DEATH BY THE SUPREME COURT OF FLORIDA DENIED PETITIONER THE MEANINGFUL APPELLATE REVIEW CONTEMPLATED BY PROFFITT V. FLORIDA, 428 U.S. 242 (1976) AND RESULTED IN THE ARBITRARY AND CAPRICIOUS INFLICTION OF THE DEATH SENTENCE.

In approving Florida's death penalty scheme, this Court emphasized that the state supreme court, by virtue of its statewide jurisdiction and its commitment to proportionality review of every death sentence, could avert any real risk of arbitrariness. Proffitt v. Florida, 428 U.S. 242, 259-60 (1976).

The Supreme Court of Florida, in its review of petitioner's death sentence, failed to fulfill its commitment, and in the process, denied the petitioner the meaningful appellate review of his sentence to which he is entitled. In affirming the trial court's denial of a continuance which was requested so that defense counsel could investigate and present mitigating circumstances in the capital sentencing hearing, the Supreme Court of Florida also held that petitioner was not denied the effective assistance of counsel. (App. 3. The court noted that a

claim of ineffective assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief, citing Knight v. State, 394 So.2d 997 (Fla. 1981) and Meeks v. State, 382 So.2d 673 (Fla. 1980).

Although petitioner did claim on appeal that the trial court's refusal to grant a continuance denied him affective assistance of counsel, the claim regarding counsel was raised only as to the result which the trial court's refusal had effected.

Responding to the decision, petitioner filed a motion for rehearing and/or relinquishment of jurisdiction so that an evidentiary hearing could be had before the trial court on the issue of effective assistance of counsel. (App. 507). By denying the motion to relinquish jurisdiction, the Supreme Court ignored its own precedents and reached beyond the denial of a continuance to a finding of per se effective assistance of counsel. Thus, Roy Allen Stewart was refused the opportunity to properly litigate a constitutional claim in total contravention of existing case law and rules of procedure.

Florida Rule of Criminal Procedure 3.850 provides the vehicle by which a prisoner in Florida may seek collateral review of his conviction and sentence. (App. 81-82) This post-conviction relief rule was enacted as an immediate response to Gideon v. Wainwright, 372 U.S. 335 (1963). See, Roy V. Wainwright, 151 So.2d 825, 826-27 (Fla. 1963); Witt v. State, 387 So.2d 922, 927 (Fla. 1980).

Florida case law has since established that a claim of ineffective assistance of counsel may not be raised for the first time on appeal. State v. Barber, 301 So.2d 7 (Fla. 1974). Indeed, the Supreme Court of Florida has relinquished its jurisdiction in a number of death cases so that an appellant may file a motion pursuant to Rule 3.850, raising a claim of ineffective assistance of counsel. See e.g., Combs v. State, 403 So.2d 418, 422 n. 1 (Fla. 1981); Scott v. State, 420 So.2d 595 (Fla. 1982).

Thus, in finding that counsel in this case was effective without that issue being raised and without the opportunity to fully litigate that claim, the Supreme Court of Florida has

arbitrarily singled-out Roy Allen Stewart for unique treatment under its reviewing function. This treatment directly conflicts with the due process requirements that a fair resolution of the merits be afforded to persons convicted of crimes on their "one and only appeal." Douglas v. California, 372 U.S. 353, 357 (1963). It is axiomatic that the requirements of due process of law fully apply to the appellate process:

> . . . [T]he proceedings in the appellate tribunal are to be regarded as part of the process of law under which [a convicted person] is held in custody , and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment. Frank v. Magnum, 237 U.S. 309, 327 (1915).

The Supreme Court of Florida's arbitrary treatment of petitioner's claims regarding the sentencing hearing in this case, coupled with the court's denial of the processes to which other capital defendants have access violates the petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

BASED upon the foregoing, petitioner requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: Rory S. Stein
RORY S. STEIN
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

ROY ALLEN STEWART,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

A P P E N D I X

Roy Allen STEWART, Appellant,

v.

STATE of Florida, Appellee.

No. 57971.

Supreme Court of Florida.

Aug. 26, 1982.

Rehearing Denied Nov. 9, 1982.

Defendant was convicted before the Circuit Court, Dade County, Lenore C. Nesbitt, J., of first-degree murder, with death sentence imposed, and defendant appealed. The Supreme Court held that: (1) failure to instruct on intent to permanently deprive another of property as an element of robbery was not fundamental error; (2) failure to grant a continuance prior to sentencing so that another psychological examination could be performed did not deny effective assistance of counsel; (3) it was not abuse of discretion to excuse prospective juror who was totally opposed to death penalty; and (4) it was not abuse of discretion to refuse to reopen to permit a detective to testify as to contents of a sworn statement made by an acquaintance of defendant.

Affirmed.

1. Criminal Law ⇐656(8)

A trial judge should not convey to a jury any intimation as to the court's opinion of the case.

2. Robbery ⇐3

Specific intent to permanently deprive another of property is an element of robbery.

3. Criminal Law ⇐1038.1(2)

Fundamental error occurs only when an omission in an instruction is pertinent or material to what the jury must consider in order to convict.

4. Criminal Law ⇐1038.1(4)

Failure to instruct that intent to permanently deprive another is an element of robbery was not fundamental error where defendant admitted that he stole personal property from the victim.

5. Criminal Law ⇐998(8)

Generally, ineffective assistance of counsel is a collateral matter which should be addressed through a motion for postconviction relief.

6. Criminal Law ⇐1119(1)

Contention of ineffective assistance of counsel was cognizable on appeal from conviction where facts on which the claim was based were evident on the record.

7. Criminal Law ⇐641.12(1)

Denial of continuance prior to sentencing so that another psychological examination could be performed did not deny effective assistance of counsel where counsel had sufficient psychiatric evaluations to work with at time of sentencing and another examination would have been merely cumulative.

8. Criminal Law ⇐586

Motion for continuance is addressed to the sound discretion of the trial court.

9. Jury ⇐108

It was neither abuse of discretion nor a violation of *Witherspoon* to excuse for cause a prospective juror, whose voir dire revealed total opposition to death penalty and who stated that he did not believe in the death penalty under any circumstances.

10. Criminal Law ⇐986.6(3)

It was not error, at death penalty phase, to overrule unspecified objection to State's inquiry of medical examiner as to how much pain a person being electrocuted felt, especially as cross-examination on effects of electrocution extended for four pages.

11. Criminal Law ⇐986.6(3)

At sentencing phase of capital penalty phase the court properly disallowed testimony of a defense witness who had observed numerous executions.

12. Criminal Law ⇐686(1)

Reopening of case for additional testimony is discretionary.

13. Criminal Law ⇐686(1)

It was not abuse of discretion to refuse to reopen to permit capital penalty defendant to call a detective to testify as to a sworn statement made by an acquaintance of defendant for purpose of showing that the acquaintance had lied.

14. Criminal Law ⇐1043(3)

Where, at trial level, defendant sought to reopen for purpose of showing that an acquaintance had lied in her sworn statement, defendant could not be heard to complain on appeal that refusal to reopen precluded him from showing evidence of remorse in that acquaintance's statement said that defendant told her he was sorry for what he had done.

Bennett H. Brummer, Public Defender and Robert R. Schrank, Asst. Public Defender, Miami, for appellant.

Jim Smith, Atty. Gen. and Calvin L. Fox, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

Roy Allen Stewart appeals his conviction of first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm this conviction and sentence.[1]

A Dade County grand jury issued a four-count indictment charging Stewart with first-degree murder, robbery with a weapon, sexual battery with force likely to cause serious bodily injury, and burglary of an automobile with a weapon. The charges stemmed from the robbery and sexual battery of an elderly woman and her death by beating and strangulation. The victim suffered eight broken ribs, brain hemorrhages due to blows to the head, two human bites, a fractured larynx and lacerations of the vagina. The medical examiner testified that she was alive when all the injuries occurred and that the cause of death was multiple blunt trauma. The jury found Stewart guilty of all charges and recommended the death penalty for the homicide conviction.

[1] Stewart allegs that a comment by the trial court to the prospective jurors so prejudiced him that a new trial is required. A trial judge should not convey to a jury any intimation as to the court's opinion of the case. *Raulerson v. State*, 102 So.2d 281 (Fla.1958). We find that the judge's remark did not violate this rule and did not prejudice Stewart's defense.[2]

[2-4] In his second point Stewart alleges that the trial court committed fundamental error by failing to instruct the jury on the intent to permanently deprive another of property as an element of robbery.[3] This specific intent is a requisite element of the crime of robbery. *Bell v. State*, 394 So.2d 979 (Fla.1981). At the time of Stewart's trial, however, the standard jury instructions did not contain intent to permanently deprive as an element of robbery, and Stewart's jury did not receive such an instruction. The district courts of appeal have considered this issue and have held that fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict. *Gibson v. State*, 403 So.2d 1019 (Fla. 3d DCA 1981), *review granted*, Feb. 15, 1982; *Williams v. State*, 400 So.2d 542 (Fla. 3d DCA), *review denied*, 408 So.2d 1096 (Fla. 1981). *See Leary v. State*, 406 So.2d 1222 (Fla. 4th DCA 1981). In the instant case Stewart took the stand in his defense and admitted that he stole personal property from the victim. Intent to permanently deprive another of property, therefore, was not at issue due to Stewart's admission.

1. Although not questioned on appeal, we have found no error regarding Stewart's convictions of robbery, sexual battery, and burglary and, therefore, affirm those convictions and their attendant sentences.

2. Additionally, we note that Stewart failed to object to the court's comment. We have previously held that if an allegedly improper comment is not objected to, an appellate court will not reverse a conviction unless the comment is so prejudicial as to be fundamental error. *Ross v. State*, 386 So.2d 1191 (Fla.1980).

3. We note that defense failed to object to the instructions given at trial.

We find no merit to Stewart's claim on this issue.

[5-8] Stewart also claims that the trial court's failure to grant a continuance prior to sentencing so that another psychological examination could be performed denied him the effective assistance of counsel. Because the facts on which this claim is based are evident on the record before this Court, this contention is cognizable on appeal.[4] We find, however, no merit to this claim. The record shows that defense counsel had sufficient psychiatric evaluations to work with at the time of sentencing. It appears that another psychiatric examination would have been merely cumulative. A motion for continuance is addressed to the sound discretion of the trial court,[5] and we find neither an abuse of discretion regarding the instant claim nor a denial of effective assistance of counsel.

Prior to trial, three psychiatrists examined Stewart; each found him competent to stand trial and able to assist in his defense. On the day the sentencing proceedings began (three days after the guilt phase ended), defense counsel moved for a continuance and appointment of a psychiatrist and a psychologist. The defense claimed that further psychological examinations specifically directed to the mitigating circumstances set out in subsections 921.141(6)(b), (e), and (f), Florida Statutes, were necessary to insure a fair sentencing proceeding. On appeal Stewart claims that the court's denial forced him to rely solely on lay testimony, thereby preventing the unlimited consideration of mitigating evidence as mandated by *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

The trial court, in denying the motion, noted that two attorneys had been working diligently on Stewart's case for more than a month; she found them eminently prepared and commended their thorough trial conduct. In light of the previous psychological examinations which gave rise to the doctors' opinions that Stewart had the capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law, the court found another professional evaluation unwarranted. We agree. The defense could have called any or all of the examining psychiatrists and asked them on the witness stand if they had formed an opinion regarding the applicability of subsections 921.141(6)(b), (e), and (f) to Stewart. Such questioning and testimony would have been both permissible and appropriate. We find that the trial court in no way limited the presentation or consideration of mitigating evidence and hold that the trial court did not abuse its discretion by refusing to grant the continuance.

[9] Stewart also alleges that the court erred, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), by excusing for cause a prospective juror who, although opposed to the death penalty, could have been an impartial juror. A review of the voir dire of this prospective juror reveals his total opposition to the death penalty and that he did not believe in the death penalty under any circumstances. We find that the trial judge neither committed a *Witherspoon* violation nor abused her discretion by excusing this prospective juror.

As his final point on appeal Stewart alleges that numerous infirmities in the sentencing proceeding require that he be given a new sentencing hearing. Our review of the record shows these claims to be without merit.

[10, 11] The state asked the medical examiner a single question about how much pain a person being electrocuted feels. Defense counsel then stated, "I object," but presented no grounds or arguments to support the objection. Defense's subsequent cross-examination of this doctor on the ef-

4. Generally, ineffective assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief. *See Knight v. State*, 394 So.2d 997 (Fla.1981); *Meeks v. State*, 382 So.2d 673 (Fla.1980).

5. *Magill v. State*, 386 So.2d 1188 (Fla.1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Fla.R.Crim.P. 3.190(g)(2).

fects of electrocution extends for four pages in the transcript, and we find no error in the court's overruling the objection. Additionally, the court properly disallowed the testimony of a defense witness who had observed numerous executions. *Shriner v. State*, 386 So.2d 525 (Fla.1980), *cert. denied*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981).

Stewart also claims that the state introduced improper aggravating evidence, exceeded the scope of cross-examination, and argued nonstatutory aggravating circumstances to the jury. The record, however, shows that the complained-of evidence supported the statutory aggravating factors, that the state conducted a proper cross-examination, and that the final argument fell within the wide latitude permitted for argument.

After resting in the sentencing proceeding, but prior to argument, the defense requested permission to reopen its case to put on one more witness. The defense wanted this witness, a detective, to testify as to the contents of a sworn statement made by an acquaintance of Stewart's. To support his request defense counsel stated that he wanted to show that the acquaintance had lied in her statement. Before this Court, however, Stewart claims that disallowing this testimony precluded him from showing evidence of remorse because the acquaintance's statement said that Stewart had told her he was sorry for what he had done.

[12-14] Reopening a case for additional testimony is discretionary, *Hoey v. Fletcher*, 39 Fla. 325, 22 So. 716 (1897). Notwithstanding the failure to object to the court's ruling,[6] we find that the trial court did not abuse her discretion in this instance. Moreover, by changing his assessment of the import and effect of the sworn statement Stewart has improperly raised in this Court a ground for review not brought before the trial court.

We also find that the trial court did not err in refusing to give all of Stewart's proposed instructions or in finding that five aggravating,[7] but no mitigating circumstances had been established. As the trial court pointed out, the standard sentencing instructions adequately cover the matters included in the proposed instructions. There is no evidence that the judge and jury failed to properly weigh and consider the evidence presented to them, and the record amply supports the trial court's written findings of fact.

Finding no error in this well-prepared and well-tried case, we affirm both the conviction and sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

Al Curtis POWERS, Clerk of the Circuit Court, Petitioner,

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF JACKSONVILLE, a corporation, Respondent.

No. 61300.

Supreme Court of Florida.

Aug. 26, 1982.

Rehearing Denied Nov. 4, 1982.

Mortgagee filed objection to clerk of circuit court's entitlement to registry fee, in

6. Defense counsel merely acquiesced in the court's denial.

7. The court found the following aggravating factors under § 921.141(5), Fla.Stat.: under sentence of imprisonment; previous conviction of crime involving use or threat of violence; felony murder; pecuniary gain; and heinous, atrocious, and cruel.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 57,971

ROY ALLEN STEWART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING AND/OR RELINQUISHMENT OF JURISDICTION

The appellant, through undersigned counsel, hereby moves this honorable Court to grant rehearing in this cause, and as grounds therefor states the following points of law or fact which this Court has overlooked or misapprehended:[1]

1. In regard to the lower court's denial of a continuance of the penalty phase (O. 3-4), this Court has overlooked the fact that the motion for continuance was not based solely upon a request for additional psychiatric examination; the motion claimed a general justifiable lack of preparedness for the sentencing phase which included the absence of appropriate psychiatric testimony. (I. 15-29).

Also, to the extent that this Court's decision rules upon ineffectiveness of and caused by counsel as opposed to ineffectiveness caused by the lower court's improper denial of a continuance, it has decided an issue which has not been argued and, under the prior decisions of this Court, could not have been argued by appellant on direct appeal. (R. 6). Moreover, all the facts necessary to the determination of an effectiveness of counsel issue are not of record (e.g., all three psychiatrists who examined appellant expressed a desire to do further tests, which were not done; no psychiatrist expressed an opinion as to the existence of the mitigating circumstances in question);

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1 In this motion, the symbols "I.", "R." and "O." shall designate reference to the initial brief, reply brief and opinion in this cause, respectively.

without knowledge as to what this and other testimony would have revealed, this Court can not determine whether such testimony could have affected the outcome. (I. 24-29, 31). The appellant therefore moves this Court to relinquish jurisdiction to the lower court for an evidentiary hearing on this issue, so that appellant can properly argue the applicable law and facts.

2. In regard to the Witherspoon claim raised on this appeal, this Court found no violation because of its determination that the "voir dire of this prospective juror reveals his total opposition to the death penalty and that he did not believe in the death penalty under any circumstances." (O. 4). Even assuming the accuracy of the aforesaid findings (with which appellant disagrees), these are the very factors which Witherspoon held to be an improper basis for exclusion of a juror. (I. 35-39; R. 8-11). Although Mr. Gillis stated that he did not believe in capital punishment, he also stated that he could recommend it. (I. 36-39).

3. In regard to this Court's ruling that there "is no evidence that the judge and jury failed to properly weigh and consider the evidence presented to them" (O. 6), this Court has overlooked the lower court's express finding that there was "no evidence" of either extreme mental or emotional disturbance or of substantial impairment of ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. In so finding, the lower court ignored substantial evidence, in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, _____ U.S. _____, 102 S.Ct. 869 (1982). (I. 50-52).[2]

WHEREFORE, the appellant respectfully moves this Court to grant him rehearing in this cause and/or to relinquish

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[2] On page 50 of the initial brief, the text of footnote 21 was mistakenly prefaced with the number 22.

jurisdiction of this cause to the lower court for an evidentiary hearing as to the ineffectiveness of counsel.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: Robert R. Schrank
ROBERT R. SCHRANK
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 9th day of September, 1982.

Robert R. Schrank
ROBERT R. SCHRANK
Assistant Public Defender

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

(JUDGE NESBITT)

CASE NO. 79-6621

FILED
MAY 8 1979
RICHARD P. BRINKER
CLERK

STATE OF FLORIDA)
Plaintiff,)
-vs-)
ROY STEWART,)
Defendant.)

MOTION FOR PSYCHIATRIC EVALUATION

COMES NOW the Defendant, ROY STEWART, through counsel, pursuant to Rule 3.210(a) F.R.Crim. P., and moves this Court to enter its order appointing not more than three disinterested experts to examine the defendant and as grounds therefore would show:

1. That the defendant is accused in this cause of having committed a murder in the first degree.

2. That counsel has been appointed special assistant public defender to assist the accused in his defense.

3. That on April 27, 1979 and May 2, 1979, counsel conducted extensive interviews with the defendant.

4. That based on these interviews counsel has reasonable cause to believe that the defendant was not mentally competent at the time of the offense nor is he mentally competent to stand trial.

WHEREFORE, the Defendant, ROY STEWART, through counsel moves this Court to enter its order pursuant to Rule 3.210(a) F.R.Crim. P., appointing three disinterested experts to

8 91

examine the defendant and evaluate his mental competence at the time of the offense and his mental competence to assist counsel to stand trial at this time.

Respectfully Submitted,

STANLEY M. GOLDSTEIN, ESQ.
Attorney for Defendant, ROY STEWART
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Telephone 377-4963

By _____
STANLEY M. GOLDSTEIN

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Psychiatric Evaluation was hand-delivered to the State Attorney, 1351 N.W. 12th Street, Miami, FL 33125, this 8th day of May, 1979.

By _____
STANLEY M. GOLDSTEIN, ESQ.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

NO. 79-6621

STATE OF FLORIDA,

Plaintiff,

vs.

ROY ALLEN STEWART,

Defendant.

The above-entitled cause came on for hearing before the Honorable Lenore C. Nesbitt, Judge of the above-styled Court, at the Metropolitan Dade County Justice Building, Miami, Florida, on the 22nd day of May, 1979, commencing at approximately 9:00 a.m.

APPEARANCES:

LANCE STELZER,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State of Florida.

STANLEY GOLDSTEIN, ESQUIRE,
THOMAS SHERMAN, ESQUIRE,
on behalf of the Defendant.

EXHIBIT

(Thereupon the following proceedings were had:)

THE COURT: Roy Stewart.

Now, Mr. Stelzer and Mr. Goldstein, have you read the report from Jackson Memorial Hospital?

MR. STELZER: I have read the report.

THE COURT: It only indicates that the defendant is competent to stand trial.

MR. GOLDSTEIN: If I may, I would like to make a comment. I don't know what I will use it for later, but I want to read this in the record.

It was my understanding that we were set for report yesterday. It was not on the calendar. There was no hearing. I picked up this morning's Herald and I read, "Roy Allen Stewart, the 23 year old accused with the murder of Margaret Hazslip, has been found competent to stand trial for first degree murder by someone by the name of Judge Lenore Baskin and a team of psychiatrists to go before a jury, June 25th."

If there was a hearing before Judge Baskin,, I would like to know about it, because I wasn't there and I don't know if my client was there with counsel or where it came from. And, to be perfectly frank with this, I thought I was reading tomorrow's paper, and I turned over to the racing form to see if I had tomorrow's winners. But, I don't know what this article is about or where the information came from.

THE COURT: I don't know either, except Doctor Jacobson's report has been filed and the report indicates that

MR. GOLDSTEIN: Was there a hearing? Does anybody know about a hearing before Judge Baskin?

THE COURT: The name, I don't know where it came from, because I have been called Natalie Nesbitt, and now Lenore Baskin. So, I'm Lenore Nesbitt.

MR. STELZER: Apparently, I have the nature of the report here. I have no position.

THE COURT: Today is the day for the hearing as to whether or not Mr. Stewart is competent to stand trial.

However, I do think that the report admits the question of whether or not he knew right from wrong at the time of the offense.

MR. GOLDSTEIN: And, that is something else. My client is indigent. I have been appointed here. I would like to have him re-evaluated as to Doctor Jacobson, at the time of his mental condition at the time of the incident, and at least two other doctor's along with Doctor Jacobson to evaluate him as to any mental difficulty or emotional conditions which may be relevant to statutory or non-statutory mitigating circumstances, which could be used irrelevant at the time of sentencing.

I need a full report on that, because the issue is going to come up as mitigating circumstances, and I have no

means or funds to hire doctors to examine him . I would appreciate and request, that the Court, at this time, in addition to Doctor Jacobson's re-examination, to appoint two more doctors and have him examined further.

MR. STELZER: As to the first part, I have no objection, whatsoever. I don't think Mr. Jacobson is going to re-examine him in order to draw an opinion as to the additional opinion as to whether he was competent at the time of the offense. If Doctor Jacobson said a re-evaluation or re-examination is necessary, I have no objection to it. Nor, do I have any objection appointing a couple of more psychiatrists to determine whether he is competentat the time of the offense or those factors of mitigation of a possible penalty.

THE COURT: Insofar as Doctor Jacobson, as to whether or not the defendant knew right from wrong at the time of the offense, and I'll set a date for that in just a moment.

As to the request to have the defendant evaluated by two additional psychiatrists, it appears that page four, Doctor Jacobson reports that the defendant indicated he had been hospitalized in South Carolina on two occasions for psychiatric problems. So, based upon that assertion and with no objection from the State, Doctor Jaslow and Doctor Corwin will be appointed to evaluate the defendant for two purposes. Primary, whether the defendant is competent to

stand trial and whether he knew right from wrong at the time of the offense, and a return date of May 31st for Doctor Jacobson's report and Doctor Jaslow's report and Doctor Corwin's report.

Would you please be sure that the defendant makes the calendar on that date, Mr. McLean, so we don't have to wait so long to get him over here today.

MR. GOLDSTEIN: Your Honor, as to the report from Jaslow and Corwin, can we include that they evaluate to his mental ability at the time of the offense?

MR. STELZER: That is automatically done without the order. In the question, as far as mitigating factors as to his mental capacity, I found that every psychiatrist is able to do this and determine whether he is competent at the time of the offense, without any specific questions to do that.

MR. GOLDSTEIN: If they don't do it, we have to do it for additional reports and waste more time. I'm drawing the order, if your Honor wants, and I will put it in there.

MR. STELZER: I believe the form order says the mental condition at the time of the offense. The mitigating substantial impairment of his mental ability at the time of the offense. I don't think you need anything, but you form an order.

MR. GOLDSTEIN: Here's your form order.

THE COURT: Since the mitigating circumstances --

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if we should get that far of whether the defendant to be charged with -- if he was under the influence of extreme mental or a disturbance, would be included in the issue of whether the defendant knew right from wrong at the time of the offense.

MR. STELZER: The only problem with that standard order that is used for Doctor Jacobson's report, is that it is a different one than I have. That doesn't specify, other than conducting an examination of the defendant as to his mental condition.

It doesn't specify when, and what mental condition that we are talking about. There are other methods used in the circuit that are far better than that.

THE COURT: You don't have that order in the file, do you?

THE CLERK: No, Judge.

THE COURT: I want the order that the Clerk uses that breaks it down into subsections, competency now, and at the time of the offense.

MR. McLEAN: I think Officer Vaun wants to bring something to the Court's attention.

MR. VAUN: He refused to come to Court this morning.

MR. GOLDSTEIN: Your Honor, I can explain it. He tells me that three times last week, he was brought over here. Two times last week, three times before, and he just sat back

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FILED
MAY 22 1979

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

DEFENDANT IS INCARCERATED IN DADE COUNTY JAIL

THE STATE OF FLORIDA

VS. No. 79-6521

ROY ALLEN STEWART

ORDER APPOINTING DISINTERESTED QUALIFIED EXPERT (S)

CHARGE: FIRST DEGREE MURDER, ROBBERY, SEXUAL BATTERY and BURGLARY

UPON MOTION HAVING BEEN MADE to the Court that the Defendant in the above entitled cause may not be sane, and it appearing unto the Court that there are reasonable grounds to inquire into the sanity of the Defendant to determine his fitness to be tried for the offense with which he is charged, it is therefore

CONSIDERED, ORDERED AND ADJUDGED that the following disinterested qualified expert (s), to-wit: DR. WILLIAM CORWIN, DuPont Plaza Center, Miami, FL, DR. SANFORD JACOBSON, 1150 NW 14 St. Suite 305, Miami, FL, DR. ALBERT C. JASLOW 6601 SW 80St. Miami, FL

is (are) hereby appointed to forthwith conduct an examination of the Defendant, ROY ALLEN STEWART, as to his sanity, and it is further

ORDERED that (each of) the said above expert (s) files on or before JUNE 25, 1979, a written report, in triplicate, of his (their) examination and opinion with the Clerk of this Court at his office, Room 702, Metropolitan Justice Building, 1351 NW 12th Street, Miami, setting forth the following designated particulars, to-wit:

1. General report of the mental condition of the Defendant.
2. Opinion as to the capacity of the Defendant, presently, to properly answer charges against him and aid in his own defense and stand trial.
3. Opinion as to whether, at the time of the alleged offense with which the Defendant is charged, the Defendant knew right from wrong and knew the nature and consequences of his acts.
4. Opinion as to whether the Defendant should be accorded psychiatric treatment and, if so, recommendations as to what type of treatment.

together with an invoice for his (their) service (s).

DONE AND ORDERED in Open Court at Miami, Dade County, Florida, this the 22nd day of MAY A.D., 19 79.

Lenore C. Nesbitt

LENORE C. NESBITT JUDGE

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CIR/CT/CRI 25

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

NO. 79-6621 - NESBITT

STATE OF FLORIDA,

Plaintiff,

vs.

ROY ALLEN STEWART,

Defendant.

9:00 a.m.
May 31, 1979,
Metropolitan Justice Bldg.,
Miami, Florida.

The above-entitled case came on for hearing before the Hon. Lenore C. Nesbitt, Circuit Judge, pursuant to Notice.

APPEARANCES:

LANCE R. STELZER,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State.

STANLEY M. GOLDSTEIN, ESQUIRE
and THOMAS G. SHERMAN, ESQUIRE,
1040 City National Bank Building,
25 West Flagler Street,
Miami, Florida 33130,
on behalf of the Defendant.

ALSO PRESENT:

JIM HAWKINS.

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(Thereupon, the following proceedings were had:)

THE COURT: Before we get Mr. Stewart out here, do we have the evaluations?

THE CLERK: Yes.

THE COURT: We need Mr. Goldstein.

(Thereupon, other proceedings were had, after which the following proceedings were had:)

THE COURT: Sir, do you have business before the Court?

MR. SHERMAN: Yes.

THE COURT: Let me see the evaluations on Roy Allen Stewart.

Did you file your memorandum on the Canons of Ethics?

MR. GOLDSTEIN: I gave a copy to Mr. Stelzer and am filing a copy -- a memorandum now.

THE COURT: Were these the two other evaluations ordered?

MR. GOLDSTEIN: Your Honor, I think I can explain that. I thought that -- I talked to Dr. Jaslow to find out whether he had filed it, and he pointed out to me that if you will look at the order, apparently the Clerk made a mistake, and in the order it tells them to file their reports on or before

June 25th rather than May 31st.

THE COURT: We mustn't have that.

MR. GOLDSTEIN: Which is the trial date.

THE COURT: We will have to get Dr. Jaslow to file the report.

MR. GOLDSTEIN: I told Dr. Jaslow. He said if the Clerk will send him another order, he will get one as soon as he can, but he has not made his report yet.

THE COURT: That would explain that.

Where is Dr. Corwin's? Did I get a copy of Dr. Corwin's?

MR. SHERMAN: Right here.

MR. GOLDSTEIN: Your Honor, if I may, I think we can dispose of a couple of other things.

THE COURT: We can't dispose of the competency issue at this time.

I am going to set a new date of June 8th for report by Dr. Jaslow.

What is it, Mr. Goldstein?

MR. GOLDSTEIN: I have a motion here.

You appointed Seaview Investigation, Mr. Jim Hawkins, as my investigator. I have a motion, and you limited us to $350, your Honor.

As of this date, Mr. Hawkins has done

everything I asked, and I would have a bill from him for $294.

Now, this was preliminary investigation work done before the depositions came, your Honor. Since the depositions came, I have got a load of stuff for him to do, and we are going to need more money.

THE COURT: What is the load of stuff?

I mean, without violating any of your client's rights, what is it you need it for?

MR. GOLDSTEIN: All kinds of names came up in the investigation by the police. I think maybe we will need to check out other witnesses for the defense.

He already contacted the people in South Carolina.

And we are going to run into another problem -- as long as I am here -- on top of that.

The State apparently intends to use this Dr. Souviron. As of this date, Dr. Souviron has not reached any conclusion as to the bite marks.

If the State is going to go ahead with Dr. Souviron's testimony, I think we are going -- entitled to also have an expert examine him and possibly testify for the defense. According to the preliminary report that Mr. Hawkins has given me that Dr. Souviron is the only "expert," in the State of Florida in that

going to use him.

MR. STELZER: First of all, this is premature. We don't know what Dr. Souviron's conclusion is. If, in fact, Dr. Souviron cannot conclude that those are the teeth impressions of Roy Allen Stewart to the exclusion of all tooth impressions of any other human being, maybe we need another dentist.

I strenuously object to the remarks that we have him tied-up. He is not only a witness for the State. He might well come into this Court and testify those bite marks absolutely were not made by the defendant in this case.

I don't know that yet, but he is not only our witness. He is a witness for everybody.

THE COURT: What is the status of his report?

MR. GOLDSTEIN: He was set for deposition yesterday, your Honor, and didn't appear.

MR. STELZER: I have been assured -- he was set for deposition yesterday. He called my office the day before yesterday, as I told Mr. Goldstein the day before yesterday, and he indicated since he had been in Tallahassee for approximately ten days testifying in the Theodore Bundy case, he had not had a chance to complete his work in Dade County, but absolutely would have it done by the middle of next week.

If Mr. Goldstein would schedule him for deposition next week, he will be more than happy to come in for a deposition anytime convenient to Mr. Goldstein and give his findings.

THE COURT: All right.

Now, what you are saying, number one, Mr. Goldstein; you need more money for investigative fees at this point and number two, you may need more money for an expert; is that correct?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: As to one, I will grant you an additional $350 for investigative fees.

MR. GOLDSTEIN: I have an order.

THE COURT: Before I authorize the expenditure of any funds for any expert to be flown in from New York or San Diego, I would like for you to verify with the South Florida Dental Society if, in fact, there is any other person in this State who would be able to be an expert in this area.

If not, do that within a period of three working weeks. I will give you a date to report back to the Court, and I will authorize additional fees for an expert pending the report of Dr. Souviron.

If, of course, it is not necessary at that time, I will refuse to authorize any additional fees.

I don't want this trial delayed.

MR. GOLDSTEIN: I did preface my statement if they used Dr. Souviron. If they don't, of course, the issue is not going to arise.

I can report to your Honor Mr. Hawkins has already checked the matter out. He contacted the attorneys in Tallahassee, who told him how to go about getting an expert. This is in the case of the Bundy case before Judge Cowart up there. He had information on who to contact in Maryland. The forensic team or whatever society it is that --

MR. HAWKINS: American Board of Forensic Odontology, and they do certify certain doctors to do this type of examination.

THE COURT: I still want you to check with the South Florida Dental Society because they are a very active group and they may be able to tell you that there is somebody in South Florida or in the State of Florida who may be an expert.

Now, so that there is no confusion or further delay in this case, when do you think you will take Dr. Souviron's deposition, Mr. Goldstein?

I want to be able to put this case back on the calendar for expert fees, should you need that.

MR. GOLDSTEIN: If he is available next week,

I will take it whenever he is available. I subpoenaed him for yesterday, and the State will produce him whenever they can produce him.

THE COURT: Let's get -- you subpoenaed him for a new date, have you not?

MR. GOLDSTEIN: No.

MR. STELZER: There were a few other depositions that need to be taken.

MR. GOLDSTEIN: We are still taking depositions.

MR. STELZER: Ninety-five percent of the people set for deposition did not show up.

THE COURT: Suffice it to say that by June 11th you will know whether you need an expert at that time?

MR. STELZER: I think we will know by June 8th, Judge.

MR. GOLDSTEIN: Let's set it for report June 8.

THE COURT: June 8th for report whether additional fees are necessary for dental experts to be flown in to testify because that will be a substantial amount, and we need to take care of that.

MR. GOLDSTEIN: In the taking of the deposition of Officer Stephen Roadruck, who is one of the homicide detectives assigned on this case, an issue

METROPOLITAN DADE COUNTY · FLORIDA

1611 N.W. 12th AVENUE
MIAMI, FLORIDA 33136
371-9611

JACKSON MEMORIAL HOSPITAL
Forensic Service-The Institute

May 16, 1979

79-6621

The Honorable Lenore Nesbitt
Circuit Court
Criminal Division
1351 N. W. 12th Street
Miami, Florida 33125

FILED FOR RECORD
'79 MAY 18 AM 8 57
CLERK CIRCUIT COURT

RE: STEWART, Roy
23 year old White Male
~~79-6021~~

Dear Judge Nesbitt:

The psychiatric evaluation of the above-named individual was completed at the Dade County Jail on May 15, 1979, in accordance with your court order of May 8, 1979, in connection with the charges of first degree murder, robbery, sexual battery and burglary.

A copy of the report is attached.

Sincerely,

Sanford Jacobson, M. D.
Director, Forensic Service

SJ:tm

Exhibit # 1 for appellate purposes

FILED
JUL 25 1979
RICHARD P. BRINKER
CLERK

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REPORT OF PSYCHIATRIC EVALUATION
FORENSIC SERVICE
JACKSON MEMORIAL HOSPITAL

STEWART, ROY ALLEN
23 y/o Caucasian male
May 16, 1979
Case #79-6621

Identifying Data & Reason for Evaluation: Roy Stewart is a 23 year old Caucasian male seen for psychiatric evaluation at the Dade County jail on May 15, 1979 in connection with the charge of first degree murder, robbery, sexual battery and burglarly. The defendant is seen to determine his competency for legal proceedings. The evaluation was apparently requested because of the nature of the charges against him.

Summary & Conclusion: Presently, it is felt that the defendant is competent for legal proceedings and can assist counsel in his defense and understand the nature of the charges against him. It is felt that the defendant does possess a rational and factual understanding of the charges and can communicate with counsel with a reasonable degree of rational understanding.

History & Examination: The defendant was arrested in South Carolina and returned to Dade County. He was apparently arrested there on or about April 20, 1979 and charged with the above offenses which allegedly occurred on February 22, 1979.

With respect to the alleged offense, the defendant indicated that he had been living in Miami for approximately one year working in the South Dade area as a roofer. He had

been sharing an apartment with another individual. About a month before the alleged offense, he left the apartment and began living with various friends for several days at a time. He states that he had some difficulty with his landlord. The defendant states he would work when the weather would allow it. He earned approximately $200.00 per week but spent a good deal of his money on drugs. He describes taking about 25 Quaaludes tablets per week in addition to using other pills such as barbiturates and amphetamines less frequently. He smoked about 1½ ounces of marijuana per week as well. He describes drinking at least six beers per day on most days.

The defendant states that on the evening of the alleged offense, he had been to a bar and was drinking. He recalls he took some amphetamine capsules as well as snorting $10.00 of cocaine. In addition, he thinks that he ingested four Quaaludes and may have smoked several marijuana cigarettes. He is not sure of the amount of beer but thinks that it may have been as many as 15-20 draft beers. He thinks that all of this happened on a Thursday. To his recollection he didn't work that day.

He describes leaving the bar and was walking towards his uncle's house. He saw a woman that he had known for a number of months. They entered into a conversation. He

states that she had invited him in. When he used her bathroom, he recalls seeing a pocket watch there. He took the pocket watch and a short time later, the woman apparently discovered it and began yelling at him. He recalls that she slapped him. He thinks that he hit her back. He doesn't remember anything after this. He then recalls being outside in her yard with blood on his hands. At this point, he went to a service station and washed up.

He then went to a friend's house and slept there for the night. He drove around the next day with his friend and did not work. He went to another friend's residence the next day and stayed there for several days. He thinks that he returned to South Carolina on the following Tuesday. He recalls going there by bus. When he got to Columbia, he called a former employer and began working as a roofer. He stayed there with an aunt and uncle until he was arrested.

When the defendant was asked how he was identified, he states that a female told the police that he had confessed to her about the offense. He states he was told that he allegedly did this on March 13, 1979. He states, however, that he could not have done this since he was in South Carolina at the time.

The defendant states that he had no knowledge of beating

or strangling a woman. He states that the evidence indicates that she was beaten with fists and strangled with the cord from an iron. He claims he has no memory of doing this to her. Likewise, he states that he has no recollection of any sexual assault.

The defendant states that he has never been charged with an offense like this. He acknowledges that he sometimes has a bad temper particularly when drinking. He describes getting in fights with individuals and states that when somebody hits him, something inside of him snaps. He has been convicted of two offenses in South Carolina. One was an attempted robbery in 1976 for which he spent over a year in a correctional institution. The other was for burglarly or house breaking in 1969 for which he received probation. He also was hospitalized in South Carolina on two occasions for psychiatric problems. The first was in 1974 after he took an overdose following his father's death. He remained in the hospital for about three days. In 1976, prior to his conviction for robbery, he also was hospitalized in South Carolina for a psychiatric evaluation.

The defendant describes longstanding drug abuse problems. He has been using many different drugs since the middle of his adolescence. His general work and social adjustment has been poor.

Mental status examination at this time revealed a well

developed, adequately nourished young man. He was quite and cooperative, spoke softly and the general impression was in marked contrast of the violence and aggression that would be indicated by the charges against him. There are no auditory, visual or tactile hallucinations at this time. He has intermittently experienced hallucinations in the past related to his multiple drug and alcohol abuses.

At this time, he is not hostile, aggressive or suspicious, however, it is clear that he can become very defensive and angry. He describes having difficulties of this type in various situations in the past.

However, he does not display it at this time. He seems saddened and to some degree remorseful. His anxiety level is in acceptable limits.

Testing his special faculties at this time revealed that he is oriented to the day, month and year. He comments about several news items in an appropriate manner. He identifies the president but can't recall the previous president. He has gone to school through the ninth grade but handled simple calculations quite adequately and abstract reasoning functions are not impaired. Psychological testing responses revealed elements of depression and considerable difficulties in interpersonal relationship. The findings are consistent with the clinical interview and with his previous history of drug abuse.

Recommendations: At this time, the defendant is clearly competent for legal proceedings. Treatment recommendations would be dependent on the outcome of the criminal proceedings against him.

SJ:MTI B9
5/15/79
5/16/79
Medical Transcribers, Inc.

Sanford Jacobson, M. D.
Director, Forensic Service

METROPOLITAN DADE COUNTY · FLORIDA

1611 N.W. 12th AVENUE
MIAMI, FLORIDA 33136
371-9611

JACKSON MEMORIAL HOSPITAL
Forensic Service-The Institute

May 23, 1979

FILED FOR RECORD
'79 MAY 25 AM 9 23
CLERK CIRCUIT & COUNTY CTS.
DADE COUNTY, FLA.
03

The Honorable Lenore Nesbitt
Circuit Court
Criminal Division
1351 N. W. 12th Street
Miami, Florida 33125

RE: STEWART, Roy
23 year old White Male
~~79-6021~~ 79-6621

Dear Judge Nesbitt:

The following is an addendum to my report of May 16, 1979 regarding the above-named individual. At that time I did not comment on the defendant's condition at the time of the alleged offense.

Based on the defendant's condition at the time I saw him on May 15, 1979, it would be my opinion that the defendant was at the time of the alleged offense able to meet the test for criminal responsibility. It is felt that the defendant at the time of the alleged offense, in the absence of any information to the contrary, had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.

However, as I noted in my report, the defendant apparently was intoxicated from drugs and alcohol at the time of the alleged offense and he apparently regularly took substances. How these substances affected his behavior at the time of the alleged offense, cannot clearly be determined. If additional information were available regarding the defendant's behavior at the time of the alleged offense, it is possible that this additional information might alter the opinion expressed regarding his ability to meet the test for criminal

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responsibility. However, in the absence of such information, I would have to render the opinion noted previously.

Sincerely,

Sanford Jacobson, M. D.
Director, Forensic Service

SJ:mw

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WILLIAM CORWIN, M. D., P. A.
818 DUPONT PLAZA CENTER
MIAMI, FLORIDA 33131
371-8992

May 27, 1979

Honorable Lenore C. Nesbitt
Judge, Circuit Court
Criminal Division
Metropolitan Justice Bldg.
1351 NW 12 St.
Miami, Fl. 33125

Re: Roy Allen Stewart
No. 79-6021

FILED FOR RECORD
'79 MAY 29 AM 8 04
CLERK CIRCUIT COURT
DADE COUNTY, FLA.

Dear Judge Nesbitt:

I examined Roy Allen Stewart at the Dade County Jail on May 25, 1979 subsequent to your order. The following is the summary of the examination and recommendations.

Initially a history of his past was obtained from him. He states that he is 23 years of age and was born in Florence, South Carolina February 13, 1956. He has been in Miami for about a year. He attended school to the 9th grade, having repeated the 3rd and 6th. He states that he was a slow learner and that he had difficulty with the teachers who would become angry at him and "paddle" him. He also had to help to support his family since his father was sick. He has worked mainly in the roofing business and he denies troubles on the job except for a fight he had with one fellow because they didn't like each other. Family history indicates that one sister is mildly nervous. His father died in 1974 of heart trouble and arthritis. His mother is living and well and remarried in 1978. He has 2 older sisters and an older brother. He states that relationships with his father were "real good". He had problems with his mother, oftentimes arguments and disagreements, and she would punish him physically. He finally stood up to her, refusing to let her continue.

Hon. Lenore C. Nesbitt

He is not close with his siblings and his relationship with his stepfather is superficial. Past medical history is not significant. He smokes to excess, and he has used alcohol substantially, drinking 2 to 3 six-packs of beer daily, as well as other kinds of alcoholic substances. He was frequently drunk, although he denies being alcoholic. He has used a variety of drugs, mainly marijuana and frequent use of quaaludes in the past 3 years. He has tried other drugs, preferring the so-called "downers". He does not take medication.

He had tried to enlist in military service when he was 17, but was rejected because of difficulties with his feet. He married in 1974, and they separated about a year later. She is 20 and lives somewher in South Carolina. They do not keep in touch with each other. There are no children. He admits to occasional sexual problems, mainly partial impotence. Apparently he has few real interests, and generally spends his time going to bars and drinking. Mostly he keeps to himself although he does have a few friends.

He had served 2 years at Columbia State Prison on an attempted robbery charge, and he has had other arrests related to driving while under the influence.

With reference to his present situation he states that he was arrested April 23 or April 24, 1979, on charges of first degree murder, rape and robbery. He is accused of killing a woman named Margaret although he does not recall her last name. This took place February 21, 1979. He describes being at a bar, walking by her place about 11 o'clock at night to go to his uncle's who lived nearby. He saw the woman on her porch and had known her from previous contacts. He states

Hon. Lenore C. Nesbitt

that he was "high" on alcohol, marijuana and quaaludes. He went over to talk to her, and they sat inside. He went to the bathroom, saw man's pocket watch and put it in his pocket. He doesn't know why he did this. After he returned they sat down talking, and then she went to the bathroom. She came back screaming at him about the watch. She slapped him and he hit her back. He states that he does not recall much after that. About 15 or 20 minutes later, while standing in the yard, he noticed some blood on his hands. He went into a gas station, washed his hands, and then returned to the bar where he had been before. He sat around, drank beer, then spent the night with some friends. The next morning he got up, rode around with a friend on a motor bike and drank more beer. Later he read about the woman being dead and he was frightened, not knowing what to do. He decided to return to South Carolina several days later, and went to Columbia where he was picked up and arrested. He was then returned to the jail here.

Presently he states that he feels fairly good, but is nervous and depressed. Suicidal ideas are denied. He does not sleep well, and he states that when he was first locked up in South Carolina after his arrest, he did not sleep at all. He spoke about his father being in the cell with him. He states that for the past 2½ years he has been hallucinating about his father. Mostly this happens when he is drinking, but occasionally when he is sober. His father looks as he did in life and talks to the patient, telling him that he was wrong to do what he has done and warning him about drinking. He complains about headaches on the left side of his head and the back of his head with occasional dizzy feelings.

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Hon. Lenore C. Nesbitt

Examination shows him to be a young adult white male, tall, well developed and well nourished, with scraggly long blond hair, and presenting an unshaven and unkempt appearance. He has a moustache and a beard and is not very neat or tidy. During the examination he appeared to be somewhat lethargic and apathetic, perhaps mildly depressed. On occasion he became briefly tearful. Other hallucinations are denied. Stream of thought is relevant and coherent. Occasionally he feels that people are hostile and look at him in a negative manner. However, specific delusions are denied. He was correctly oriented. School knowledge was not well retained and fund of general information was limited. Insight is superficial. He does not believe that he is mentally ill, although he acknowledges that he has some problems. Judgment is impaired, with difficulty in understanding abstract ideas.

Impression:

I believe that he is suffering from a personality disorder, with chronic alcoholism and drug abuse as factors. I do not believe that he is grossly psychotic at this time. It is my opinion that he is presently capable of properly answering the charges against him and aid in his own defense and stand trial. With reference to his ability to know right from wrong or the nature and consequences of his acts, it appears that, if he is to be believed, that he was under the influence and drugs, but that he had a clear recollection of events leading up to the time when he slapped her.

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Hon. Lenore C. Nesbitt

His subsequent claim of not recalling details during the following 15 or 20 minutes may be tied to an explosion of rage and anger. Nevertheless I must consider him to be capable of distinguishing between right and wrong and knowing the nature and consequences of his acts. In theory it would be to his advantage to have appropriate treatment for his alcohol and drug problem, preferably in a structured in-patient treatment center. It would also be of interest to have neurological studies including electroencephalogram.

Respectfully yours,

William Corwin, M. D.

WC:jl

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ALBERT C. JASLOW, M.D., P.A.
THE PROFESSIONAL CENTER
6601 S. W. 80TH STREET
SOUTH MIAMI, FLORIDA 33143
TELEPHONE 667-7072

FILED
JUN 8 1979
RICHARD P. BRINKER
CLERK MB

June 2, 1979

CONFIDENTIAL

Honorable Lenore C. Nesbitt
Circuit Judge
Metropolitan Justice Building
Miami, Florida 33125

Re: Roy Allen Stewart, No. 79-6621

Although I examined Roy Allen Stewart at the County Jail on May 25, 1979, I had delayed the dictation of the report since it was my understanding that it was not due for quite some time, and also the defendant's attorney was attempting to present various other bits of information that might be involved in formulating the responses to the questions of the Order. During my contact with the defendant, he didn't present any overt indications of serious mental disorder, there were no bizarre mannerisms, and he seemed to be fully capable of understanding everything that I asked of him. He said that he was not receiving any medications, although he had requested something for his nerves.

Roy is a 23-year-old roofer, who said that he had been separated for the past three and a half years after one year of marriage. There are no children from that union. Schooling had extended to the ninth grade, when the patient dropped out in order to help when the father was sick. He had been a loner during his schooling, and had had some difficulty with the teachers and hasn't been socially involved. Although he tried to enlist in the Service in 1973, he was rejected for physical reasons related to his feet. He was the youngest of four siblings with whom he got along just "so so," and he had argued quite a bit with one of the sisters. He also pointed out that if he stayed around his mother too long, he had a tendency to argue with her also. He denied having had problems with his father who had died in 1974.

The patient had had interpersonal difficulties and behavioral difficulties from early life, and he showed signs of insecurity from early also. He said that he had had tantrums, for which he was beaten, and he said he still had a tendency to "go crazy" if somebody hit him particularly in the head or face. He used to fight quite often in school, and he had been quite brutal with cats in his early life.

As far as his habits were concerned, he stated that he smoked quite a bit, drank to the point of intoxication, and his reaction would depend greatly on his mood or what the others might be talking about.

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He pointed out again that if he were under the influence to any extent, and there would be an argument, he seemed to lose all self-control. He pointed out that he did seem to see and talk to his father who was deceased, and seemed to be aware of the fact that this was a hallucinatory experience or something else happening that couldn't be explained. At such times he might even get angry enough to throw various pieces of furniture, and an episode like that could last even as long as fifteen minutes. This didn't only occur when he was under the influence of alcohol, but had occurred on other occasions when nothing toxic had been involved. When I asked him how such things could happen, such as talking to his father who was deceased, he stated "it was real to me." There was sufficient awareness of the unrealistic aspect of these occurrences so that he did admit of the possibility that this could be his imagination as a result of his wish that his father were actually alive so that he could talk with him and be consulting with him. The patient admitted that he had used drugs quite extensively, and had even used needles with some of the drugs. Again he pointed out that if he used combinations of drugs with alcohol or beer, and if he did get into a fight or get angry, he could lose complete control and actually black out. Despite the severity of these reactions, he denied that there had ever been any treatment for the use of drugs or alcohol. He had been arrested on prior occasions, and had spent two years in prison in South Carolina.

A few other significant factors were described by the patient in terms of his attempt to suicide after his father's death, and this was through the use of some pills that he had found at his parent's place. His behavioral outburts were particularly disturbed following the death of the father, and he gave an example of extremely disturbed and bizarre behavior which had resulted after he was unable to have his own way about something. There was an auto accident which allegedly resulted in a concussion in 1973, and there was some amnesia as a result of that injury. There hasn't been any actual psychiatric treatment, although he did talk to one man on one occasion in the hospital in South Carolina. Psychosexual problems were denied, and he said that there hadn't been much interest in women since he and his wife had been separated, and he had primarily entertained himself by going to bars and listening to music and drinking beer.

The patient was able to discuss the circumstances surrounding the alleged offenses, and despite the fact that he claimed that he had used cocaine, a few Quaaludes, and beer, he had been able to handle himself reasonably well and was able to reconstruct most of what had occurred. In the statements that had been offered by the defendant through the interrogating officers, he also seemed to have been able to reconstruct quite well most of the events of that night in question and particularly during the period of time that he was in contact with the deceased victim. One of the statements seemed to have many leading questions, but the other offered him ample opportunity to offer the event and details without apparent prompting. He did claim that

there was a period which seemed to represent a blackout after he had struck the woman the first time, and then he next remembered being in her yard and seeing blood on his hands. He claimed that he was scared of what he might find if he went back to see what had occurred, but he knew something must have happened in the house and it was then that he went to the gas station and washed his hands. After spending a night at a friend's house, he finally went back to South Carolina and obtained a job where he was able to do roofing, and eventually the police arrested him as he went to cash a paycheck. He also claimed that he had read about the crimes in the paper, and he also stated that the officers had helped him make his statements, and all of this had led him to believe the very things that he was describing. He also claimed that his father had appeared in the manner that had been described earlier, and had chewed him out during the night to the point that he was ready to talk to anybody the next day.

On more direct mental status evaluation the patient was well oriented, fund of information seemed to be adequate, and mental faculties seemed to be adequate in general. There were no overt indications of organic brain involvement, although the history that he described would suggest various possibilities that certainly should be evaluated through additional examination and investigation. His exposure to inhalants in early years, and the extensive use of alcohol and drugs, the claim of the head injury with periods of amnesia and the alleged rage reactions would certainly suggest that there could be additional factors that should be considered on an organic basis. At the time of the examination he certainly appeared to be sane and competent, capable of answering the charges against him and assisting in his defense despite the fact that he did state that he had no actual recollection of the use of an ironing cord with which the victim had been choked, didn't recall the details of the rape, and supposedly only recalled hitting the woman one time before he lost full awareness of what was happening. Concerning his mental state at the time of the alleged offenses, on the basis of the material that has been supplied describing his actual statements and his own description of the circumstances, it would appear that he had the capacity to retain and recall most of the details of the period of time in question. This would suggest that even though he had been under the influence of alcohol and drugs by his own description, and these greatly hampered his judgment and his control, nevertheless he had sufficient awareness to realize that what allegedly had occurred could lead to his apprehension and incarceration. It would certainly appear that he had known that what had allegedly occurred was wrong, and he had an idea of what the consequences of those actions could be.

It would perhaps be worthwhile to attempt to investigate and document prior history of such "rage reaction" as have been described, and see whether there have been episodes of extreme violence and brutality without the awareness or recollection of the patient as far as others could determine. Organic investigations, as have been suggested

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earlier, could perhaps show such things as alteration of EEG patterns, particularly while under the influence of such things as alcohol or drugs or both. Although the defendant did state that he had spent quite a disturbed night responding to the hallucinatory accusations and harrassment of his deceased father, and this resulted in his acceptance of the need to make a proper statement, nevertheless it does not seem that he had any unreasonable or compelling need to confess which had brought the statement circumstances about. Likewise, it did not seem that active major mental disorder had produced the request for any opportunity to confess, but rather it was easing his resistance to the opportunity to offer the statement in response to the demands of the interrogating officers.

Sincerely,

Albert C. Jaslow, M.D., F.A.

ACJ/ec

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

NO. 79-6621

STATE OF FLORIDA,

Plaintiff,

vs.

ROY ALLEN STEWART,

Defendant.

The above-entitled cause came on for hearing before the Honorable Lenore C. Nesbitt, Judge of the above-styled Court, at the Metropolitan Dade County Justice Building, Miami, Florida, on the 8th day of June, 1979, commencing at approximately 9:00 a.m.

APPEARANCES:

LANCE STELZER,
Assistant State Attorney,
State Attorney's Office,
on behalf of the State of Florida.

STANLEY GOLDSTEIN, ESQUIRE,
THOMAS SHERMAN, ESQUIRE,
on behalf of the Defendant.

(Thereupon the following proceedings were had:)

MR. STELZER: Your Honor, we have everything today on the Stewart case. There's Mr. Stewart.

THE COURT: Let's see all of the reports, please.

MR. GOLDSTEIN: Your Honor, Doctor Jaslow says that he is competent to stand trial and he knows the difference between right and wrong at the time of the offense.

We'll stipulate to the report.

THE COURT: That's what everybody says, isn't it?

MR. STELZER: Yes.

THE COURT: So, he is competent to stand trial at this point, and he knew right from wrong at the time of the offense. Based on Doctor Jaslow's report of June 2nd, 1979, do you stipulate to this?

MR. STELZER: Yes, your Honor.

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: And, Doctor Jacobson's report of May 23rd, 1979?

MR. GOLDSTEIN: They all say pretty much the same thing.

THE COURT: And Doctor Corwin's report of May 29th, 1979, all of which are filed in the Court file. Let's move to the next subject of the expert dentist.

MR. GOLDSTEIN: I took Doctor Souviron's

deposition yesterday afternoon, and he made a determination that in his opinion the bite marks found on the body -- on the thigh -- of the victim were consistent with the teeth marks with the tooth impressions -- or whatever impressions -- he made of the teeth in Mr. Stewart's mouth. In that respect, your Honor, we would request appointment of another forensic odontologist.

MR. STELZER: Doctor Souviron suggested three. One in Charleston, South Carolina. The second is in Memphis, Tennessee. The third is in Baltimore, Maryland. The doctor in Baltimore is tied up.

THE COURT: What do you want to do, Mr. Goldstein?

MR. GOLDSTEIN: I appreciate Doctor Souviron and Mr. Stelzer trying to pick out my expert for me. We have made inquiry. As the Court ordered we contacted the South Florida Dentistry Board -- Mr. Sherman did that. They told us the only one, locally, that might be qualified as a Doctor Klein, who is the chief oral surgeon at Jackson Memorial Hospital. We called Mr. Klein and he says eight to ten years ago, when he was in Allegheny County, he did some of this stuff. He never testified in Court on this particular issue, which is a new issue. He is not qualified at this time and doesn't want anything to do with it.

We then called the public defender's office in Tallahassee and asked them for a list of doctors that they

Tuesday. He was subpoenaed to come to Tallahassee for the Bundy matter. Although Doctor Souviron tells you that that will be called off, the word I got from Doctor Levine is that he will be in Florida anyway next week. We would lik Doctor Levine appointed.

MR. STELZER: No objection to Doctor Levine.

MR. GOLDSTEIN: You told me to investigate and I investigated.

THE COURT: He is the only one that could come?

Do you have an order prepared for Doctor Levine? Do you want to go to Tallahassee?

MR. STELZER: He's going -- he has to come here.

THE COURT: What about the order? Do you want me to sign it?

MR. GOLDSTEIN: Are you ready for this Transporati

THE COURT: His expert fee. I'm not ready quite yet.

MR. GOLDSTEIN: Do you want to wait for a bill? I think he gave us an estimate of about $600 a day, which I understand is fairly standard.

MR. SHERMAN: Seventy five dollars an hour, is what it comes to.

THE COURT: Mr. Ragan in the County Commissioners office, worries about that.

MR. GOLDSTEIN: Does the Clerk have an order form for appointment of doctors?

THE CLERK: No.

MR. GOLDSTEIN: I'll draw an order and get it here this afternoon.

THE COURT: I may not be here this afternoon, Mr. Goldstein. How soon can you get it to me? I will be here until about noon.

MR. GOLDSTEIN: I will do the best I can.

THE COURT: What's his full name?

MR. GOLDSTEIN: Lowell Levine.

THE COURT: When do you propose to take the depositions, so you can put this on notice?

MR. GOLDSTEIN: He has to come and get the material from Doctor Souviron and do whatever they do, and that depends on how much help he gets from the State.

MR. STELZER: As soon as he is done looking at whatever Doctor Souviron has in his office, we will ask him what his determinations are, and if necessary, we will take his deposition that day or the day after. We will not waste time

MR. GOLDSTEIN: Hopefully, we can do it all next week.

THE COURT: Get an order appointing Doctor Levine to come as soon as possible, Mr. Goldstein, as an expert in this trial of Roy Stewart, which is set for trial on June 26th.

Are there any other problems, gentlemen?

MR. STELZER: None that we know of.

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION (JUDGE NESBITT)

CASE NO. 79-6621

STATE OF FLORIDA,
Plaintiff,
-vs-
ROY ALLEN STEWART,
Defendant.

MOTION FOR CONTINUANCE OF DEATH PENALTY PROCEEDING

The defendant, through undersigned counsel, hereby moves to continue the penalty hearing scheduled for Thursday, July 5, 1979 in the above-styled cause and as grounds therefor would state:

1. That undersigned counsel were appointed to represent the defendant in this cause on or around May 1, 1979, and thus was given approximately seven weeks to prepare for the trial stage.

2. That the trial in this cause included several complex issues, including an issue of first impression, namely expert testimony on bite mark evidence.

3. Depositions in this cause were transcribed completely only approximately two days before trial, and the taking of depositions only a week before that.

4. That in sum, undersigned counsel, did all that was humanly possible to prepare for the trial stage herein, and was unable to devote any significant time to what was still not a reality, namely the penalty phase.

5. That to compel the defendant to submit to the penalty proceeding, only two days after the trial on guilt or innocence is completed in this cause amounts to a denial of equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution in that it would discriminate against the indigent. This is specially true in a capital case, where extensive

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investigation is required for the penalty phase in order to present a reliable, individualized view of the defendant to the jury which includes all mitigating evidence, as required by the United States Supreme Court. Lockett v. Ohio, 98 S. Ct. 2964 (1978). Thus, it is clear that a person with substantial means would have been in a much better position to prepare for this "speedy" guilt or innocence trial and penalty proceeding.

6. That if counsel must go forth at this time with the penalty phase, it appears nearly impossible for the defendant to be guaranteed his Sixth Amendment right to effective assistance of counsel in this obviously critical proceeding, in light of the standards set forth in Lockett, supra.

7. That if granted a continuance in this cause, the defendant intends to present witnesses on behalf of the defendant, who will testify about the character of the defendant, the nature of the offense and the nature of the penalty at issue herein.

8. In addition, after receiving word of the verdict, the defendant's family is driving down from South Carolina on July 4th, 1979 and counsel has not had an opportunity to confer with them and will not be able to until Thursday morning, an hour before the hearing, at which time counsel must also depose the State's witnesses. Again, this will substantially detract from counsel's effectiveness at this most crucial proceeding.

9. That subsequent to the verdict herein, the undersigned have conferred with other attorneys who have defended First Degree Murder cases on the question of necessary preparation for the penalty phase. Said attorneys have advised that it is impossible to effectively represent a defendant at the penalty phase under the above described conditions, in light of the standards set forth in Lockett v. Ohio, supra, and Gardner v. Florida, 430 U.S. 349 (1977). ["death is a different kind of punishment:" the sentencing is

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a critical stage where the defendant is entitled to due process and effective assistance of counsel; the decision to impose the death sentence must be based on reason.]. One of these attorneys has agreed to appear for this Motion to Continue and will give testimony on this question.

10. In conclusion, Florida Statute §921.141(1) states that the [sentencing] "proceeding shall be conducted by the trial judge before the trial jury as soon as practicable." As far as the defendant is concerned, under the circumstances herein, it is not practicable to hold the sentencing proceeding one working day after the trial on guilt or innocence. The defendant is indigent, his family is from a foreign state, he was brought to trial approximately 50 days after his appointment of counsel in a case involving new and complex legal issues, and thus undersigned counsel respectfully submits that without a continuance, they cannot effectively represent the defendant at this proceeding based on the guildelines set forth in Lockett v. Ohio, supra and Gardner v. Florida, supra.

Respectfully submitted,

STANLEY M. GOLDSTEIN

THOMAS G. SHERMAN

WE HEREBY CERTIFY that a true copy of the foregoing Motion for Continuance of Death Penalty Proceeding was hand-delivered to the State Attorney's Office this 5th day of July, 1979.

STANLEY M. GOLDSTEIN
and
THOMAS G. SHERMAN

By

STANLEY M. GOLDSTEIN, ATTORNEY AT LAW, 1040 CITY NATIONAL BANK BUILDING, MIAMI, FLORIDA 33130 • TELEPHONE (305) 377-4963

FILED
JUL 5 1979
RICHARD P. BRINKER
CLERK

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION (JUDGE NESBITT)

CASE NO. 79-6621

STATE OF FLORIDA,
Plaintiff,
-vs-
ROY ALLEN STEWART,
Defendant.

MOTION FOR PSYCHOLOGICAL AND PSYCHIATRIC EVALUATION OF DEFENDANT FOR PURPOSES OF PENALTY PROCEEDING

The defendant, through undersigned counsel hereby respectfully requests the appointment of a Psychiatrist to examine the defendant for purposes of the penalty proceeding and as grounds therefor would state:

1. That psychiatrists were appointed prior to trial to evaluate the defendant to determine whether he was competent to stand trial and insane at the time of the offense. Those evaluations have nothing to do with the questions now in issue.

2. That a psychiatrist and psychologist must be appointed at this juncture to evaluate the defendant so as to determine whether the defendant has any redeeming qualities, in order to present to the jury a reliable individualized view of the defendant which includes all relevant mitigating evidence as required by Lockett v. Ohio, 98 S. Ct. 2694 (1978).

3. That these evaluations are necessary in order to give the defendant a fair opportunity to present mitigating circumstances such as extreme mental or emotional disturbance [F.S.§921.141(7)(b)] which has been defined as less than insanity but more than the emotions of an average man, however inflamed. State v. Dixon, 283 So.2d 1 (1973). Mental disturbance which interferes with but does

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not obviate the defendant's knowledge of right and wrong may be considered as mitigating. Id at 10.

Respectfully submitted,

STANLEY M. GOLDSTEIN, ESQ.

THOMAS G. SHERMAN, ESQ.

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Psychological and Psychiatric Evaluation of Defendant for Purposes of Penalty Proceeding was hand-delivered to the State Attorney's Office at 1351 N.W. 12th Street, Miami, Florida this 5th day of July, 1979.

STANLEY M. GOLDSTEIN
and
THOMAS G. SHERMAN

By

STANLEY M. GOLDSTEIN, ATTORNEY AT LAW, 1040 CITY NATIONAL BANK BUILDING, MIAMI, FLORIDA 33130 • TELEPHONE (305) 377-4993

watch. She contacted the defendant, and then the defendant contacted her back, putting her in fear, and clearly there was force, violence, assault directed towards Mrs. Haislip with the ultimate intent to take that watch and keep that watch which he had taken and placed in his pocket.

THE COURT: All right, as to the Motion for Mistrial, based upon prosecutorial comments during closing argument, I do not believe that the comments were improper. Motion for Mistrial is denied.

As to the allegations, insofar as the Motion for Judgment of Acquittal as to the robbery charge, the standard jury charge clearly indicates that the property may be taken from the person or immediate custody of the victim, and I believe it is sufficient evidence in this case that the events that coincided of the taking of the watch and the force and violence directed towards Mrs. Haislip, that there was sufficient evidence of a robbery.

Therefore, the Motion for Judgment of Acquittal as to Count II of the Indictment is denied.

What other further motions do you have?

MR. SHERMAN: I have some motions pertinent to this proceeding.

The defendant's first motion is a motion to

continue this penalty proceeding. The motion is based on the following:

As you know, the verdict was returned Monday night at 11:00 o'clock. Mr. Goldstein and I were appointed about a week apart, on or about May 1st, 1979, and the trial was held approximately fifty days later. The depositions were completed approximately a week before trial, and we received the copies of those depositions throughout the final week of preparation.

As a result, we weren't able to do the kind of preparation that we would have liked to have done for the sentencing proceeding.

We did all that was humanly possible the last couple of days -- that is, Tuesday and yesterday -- to prepare for this proceeding.

There are several witnesses that we'd like to bring before the jury and before the Court on behalf of the defendant.

For example, we would like the psychiatrist to do an evaluation of the defendant for purposes of bringing any reliable, independent evidence that could be mitigated before the jury. Locket versus Ohio says that it is reliable to have all independent reliable evidence before the jury in

mitigation. I think if the defendant hadn't been indigent and didn't have to rely upon special public defenders, that he would have had the resources to better prepare for the sentencing proceeding.

We have talked to other attorneys who have been involved in first-degree murder capital cases, and we have told them what our situation has been, and they have advised --

MR. STELZER: I object to what other attorneys advised.

THE COURT: Sustained. Let's not go to any attorney's opinions or any other Judge's rulings of this Circuit.

MR. SHERMAN: It is our opinion that we can't be effective for the defendant with this type of time limit, and I think all the statutes -- 921.12 -- that the penalty be held as soon as practical, and as far as the defendant is concerned in this case, this is not practical.

We do have one witness who was able to fly into Miami from Texas on about a 12-hour notice, and he flew in. It is possible that we can have a priest here at 3:00 o'clock to testify for the defendant. But, we would like another priest. We have been advised what the position of the Catholic Church

is as to capital punishment.

THE COURT: The defendant isn't Catholic, is he?

MR. SHERMAN: No, but some of the jurors may be.

THE COURT: Is that all you have on the Motion for Continuance?

MR. GOLDSTEIN: I would like one other thing, if I may. The defendant's family all live in South Carolina. I have talked to one sister on the phone, I think, two times since we got involved in this case, and it was basically on the progress of the case and things of that nature. Nothing to do with preparing for this particular phase of the proceedings.

I have two sisters, a mother, and some of his uncles and aunts. They drove down from South Carolina. They arrived late last night. The first time that I had to talk to them was today. I believe if he had an opportunity to be re-examined by psychiatrists like Dr. Stillman -- while they are here -- I think the family can add a lot to what the defendant can tell the psychiatrist, so he could better arrive at a conclusion as to the defendant's mental capacities for this part of the proceedings, which I am sure Your Honor is well aware of had nothing to do with the instant issue, but something also that I would like to bring to Your Honor's attention, and I would

ask the Court at this time -- we have got a motion before Your Honor to appoint the psychiatrist for that purpose. I would request Dr. Stillman with his psychiatric staff to examine the defendant and have a chance to talk to the family to get some kind of background on him, before a conclusion is reached, so we can be better prepared to present it to the jury.

THE COURT: Let's go through the motions before I rule on them.

MR. SHERMAN: One more thing. I believe we have seen Dr. Diggs out in the hallway. This is news to us, as far as -- never mind, Your Honor.

THE COURT: Is that all you have on the Motion for Continuance and the Motion for Psychiatric Evaluation?

MR. SHERMAN: That is it, as far as those motions are concerned.

There is a Motion in Limine to exclude reference researches of certain testimony, that testimony being the rebuttal on the State of Carol Myers. Upon reflection of that testimony, we did object to the time, and we renewed the objection and request that either one thing or the other -- a new jury be empaneled or that the jury be advised to disregard

than first-degree murder. Along with Mr. Stelzer, a well-known Ms. Shirley Spellerberg, who has a TV interview show -- I don't know if the jurors know her or not -- that also creates prejudice to the jury, opposing a death penalty in this case. They must think it is appropriate for the death penalty without hearing anything in this proceeding.

THE COURT: Is that all you have with any motions relative to the first proceeding?

MR. GOLDSTEIN: One more thing.

In reference to the Motion for Continuance, I would like to call Mr. Michael Von Zamft, who is a lawyer with the Public Defender's Office, who has tried many capital cases and has had to prepare -- on many occasions -- for this phase of the trial as to what type of preparation is necessary and how much time it entails. I have gone over my file with him, and I would offer his testimony at this time.

THE COURT: For what purpose? That you haven't done a good job, or you have --

MR. GOLDSTEIN: To show we don't have enough time to get ready for this phase of the proceeding in support of the Motion for Continuance.

MR. STELZER: We would object to any testimony from Mr. Von Zamft as to what he thinks is enough

time. That is not the issue in this case. The issue in this case is as to whether or not Mr. Goldstein and Mr. Sherman have had enough time. Mr. Von Zamft's opinion to that is --

THE COURT: I think you have set out in the Motion for Continuance all of the facts as to the necessity for the time, Mr. Goldstein.

Is there anything further from the defense as to any motions regarding the trial, in the first proceeding?

MR. SHERMAN: I would just like to say one more thing on the Motion for Continuance.

I think there are two types of capital cases: one where the evidence against the defendant is so overwhelming and there was strong evidence against the case so that you prepare for the penalty proceeding from the very beginning.

The other type is where the evidence is strong against the defendant, but the defense thinks they have a strong case.

In this case, there was strong evidence against the defendant but we did have what we thought to be a strong case for a not-guilty verdict, and we prepared and devoted all of our time to guilt or innocence, and, in addition, there are several

complex issues in this case, and one was a first impression. We had to read 600 pages of transcript of the proceedings of State of Florida versus Theodore Bundy, and it is not your particular capital case, I don't believe.

That is all I have.

THE COURT: Is there anything from the State about any response to the first Motion for Continuance?

MR. STELZER: Yes, Your Honor.

First of all, insofar as the Motion for Continuance is concerned, it is apparent that the defense has been anticipating for some time the possibility of a penalty proceeding in this case. In fact, when they submitted to the State of Florida a list of 16 witnesses on June 13, 1979, I indicated that I thought this was somewhat late in the proceedings to be giving us so many witnesses when it was due so many weeks before that.

Mr. Goldstein also indicated that a great many of the witnesses would be called solely for the penalty hearing. He specifically made reference to Mr. Brett Garett, Mr. Bill Hilliard, Mr. Jim Beckworth, and Mr. Goldstein has informed me that Mr. Beckworth is going to be testifying on behalf of the defense; that, in addition to that, the defendant's mother

will be testifying. The defendant's sister will be testifying. The defendant's aunt -- who resides in Miami -- will be testifying. The defendant's uncle -- who resides here in Miami -- will be here available to testify.

Mr. Goldstein has been able to procure the services of a gentleman from Texas who will testify apparently that he has witnessed 189 executions, and only enjoyed the first 12 and didn't like the last 177, and they shouldn't be carried out anymore.

But, clearly, an opportunity on behalf of the defense to anticipate this proceeding, in fact, Your Honor, upon motion of the defense, compelled the State of Florida -- although I don't believe there is any legal authority for it -- to provide to Mr. Goldstein a list of all of the witnesses who we anticipated calling in this penalty proceeding.

We provided that list a long, long time ago, and at no time has there ever been any objection to the witnesses that we intend to call.

The defense has clearly had the same opportunity to gather up whatever witnesses they want for this proceeding, at any time they would want.

In fact, it appears that they have done an excellent job in doing so.

Insofar as the psychiatrists are concerned, if you will recall earlier in this case, when it first came to court, psychiatric evaluations were done of the defendant, and they were ordered, and, additionally, when the evaluations of Dr. Jacobson from the Jackson Memorial Hospital came back, said that he was competent at the time of the offense and he was competent to stand trial.

Mr. Goldstein brought to the attention of the Court the fact that the Clerk's order was defective in that it didn't also ask Dr. Jacobson to render an opinion as to whether or not the defendant's ability to appreciate the criminality of his conduct at the time the crime was committed was substantially impaired. The latter going to the question of aggravating or mitigating factors. The former going to competency to stand trial or his competency of the time of the offense.

Your Honor, at that time, Mr. Goldstein wanted reappointed Dr. Jacobson to determine that very psychiatric issue, namely, whether or not the defendant's capacity to understand the criminality of his conduct was substantially impaired, and Dr. Jacobson, in a subsequent report, then rendered an opinion thereon.

as to this matter, because they have previously indicated under oath that they don't know who myself or Mr. Godwin are, and they don't know about us.

The mere fact that the public includes a woman as fine as Mrs. Shirley Spellerberg, who happens to have a television program, should not, in any way, reflect on our ability to handle this matter.

I, along with Mr. Godwin, intend to handle this case pursuant to the laws of Florida and put aside our personal beliefs as well as ask the jury to do the same, and simply rely upon the laws of the State of Florida to determine what is an appropriate sentence in this case.

THE COURT: Mr. Goldstein, do you want some brief rebuttal?

MR. GOLDSTEIN: Just briefly, as far as the psychiatrist is concerned.

I have here the reports from Dr. Corwin, which deal initially with the defendant as to the sentence, not between right and wrong and knowing the consequences of his acts. It talks about alcohol and drugs, and as to neurological studies including an electroencephalogram.

Dr. Corwin has made no mention of what we are facing in this proceeding.

The second report from Dr. Jacobson refers to -- by Mr. Stelzer -- states the following: that at the time of my report on May 16, 1979, at that time I did not comment on the defendant's condition at the time of the alleged offense, and he goes on to report about the defendant's condition at the time of the alleged offense.

Dr. Jaslow's report is basically the same thing. It concerns himself with the defendant's capacity to understand the difference between right and wrong and his condition at the time of the offense.

Your Honor, I have not had enough time to go back over with all the doctors and the basic thing -- the main thing -- is that I never had any idea -- although the defendant told me about some history -- that he was psychiatrically examined one time, when he was in jail on another case, up in South Carolina.

Since talking to the family about events and things that have happened in his life, I believe if this information in the family -- if the family also would have a chance to talk to the doctors, that the doctors may be very, very helpful to the defense, as far as mitigating circumstances are concerned.

Dr. Corwin, you know, is out of town at this time.

an opinion has been rendered to that mitigating characteristic by Dr. Jacobson.

In addition, the other two have rendered opinions that at the time of the alleged offense the defendant knew right from wrong and knew the consequences of his act.

Insofar, once again, as to the publicity, Miss Carol Gottlieb appeared on the television show with me. Her views on capital punishment are likewise, as well as mine. She is well-known in the community to be against capital punishment. Does the mere fact of Mrs. Gottlieb's views preclude her from sitting in the courtroom and watching the proceedings? Of course not. I have no objection to her being here at any time.

THE COURT: Insofar as the Motion for Continuance of the death penalty proceeding is concerned, filed by the defendant, the Court makes the following finding: originally, I appointed Mr. Stanley Goldstein to represent the defendant on or about May 1st, 1979. Shortly thereafter, he asked for the association of Mr. Thomas Sherman, which I authorized and permitted. Therefore, there are two attorneys working on the case for over a month. I supposed that most attorneys would always like to be better prepared

for a case, no matter how much time they had. However, I offered that Mr. Goldstein and Mr. Sherman, by latitudes insofar as the hiring and payment costs of the investigators, depositions. I feel that they eminently prepared and I commend their thorough trial conduct. They cross-examined each and every witness properly, in my opinion, and I think they did an excellent job at the trial.

Therefore, the Motion for Continuance is denied.

The motion for the psychiatric evaluation for the defendant for purposes of the penalty proceedings, as has been previously pointed out on the report of the defendant, the defendant has been examined on three occasions or more by Drs. Jacobson, Corwin, and Jaslow. At all times the consensus of the doctors' opinions was that the defendant, at the time of the alleged offense and any time thereafter, had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.

I feel there has been ample amounts of work and time that has gone to the evaluation of the defendant, and therefore, the motion for psychiatric evaluation is denied.

Insofar as the Motion in Limine to exclude

mere fact he was originally under imprisonment -- whether his parole is revoked with or without notice -- as it seems to me.

What else did you want to bring to my attention?

MR. GOLDSTEIN: Is this your ruling that they can't introduce that he was under imprisonment at the time of the offense?

THE COURT: Yes, it is.

MR. GOLDSTEIN: As to B, the defendant was previously convicted of another capital felony. There is no proof of that, or the felony involving the use or threat of violence to the person. All right, Your Honor, I understand the State attempts to -- the State is going to bring in -- through A, apparently with his parole officer -- the fact of his arrest for housebreaking and larceny.

THE COURT: You mean conviction? Not just arrest?

MR. GOLDSTEIN: A conviction for housebreaking and larceny, which are not violent crimes and should not be brought before the jury.

According to aggravating circumstance number B, the only one where they would have a reasonable argument for, I believe, is for a felony involving the use or threat of violence -- would be the

attempted armed robbery.

THE COURT: How about that, Mr. Stelzer, because the jury instruction on page 83, that is very clear that the crime must be one prior crime involving threat or violence to another.

MR. STELZER: I understand that. The jury instruction is clear. The prior crime must involve violence in order to be applicable to aggravating circumstance number two, which talks specifically about a previous conviction of, or capital offense, or felony involving the use or threat of violence to some person.

The defendant has testified in this court that he has been convicted of four felonies. Two on each occasion. We intend to introduce evidence of his first two convictions, which were for burglary and larceny -- not to prove aggravating circumstance number one, but simply to negate mitigating circumstance number one, which is that the defendant has no significant history of prior criminal activity.

In Washington versus State, there is an indication in that case which involved David Leroy Washington, who confessed to numerous first-degree murders, and in the course of his confession also confessed to certain burglaries. He had never been

previously convicted of these burglaries, to-wit: he confessed that he confessed to the murder. The Court draws distinction between using past crimes to which a defendant has confessed as an aggravating circumstance number two, as opposed to a negating factor in negating mitigating circumstance number one.

The Court states that appellant states that a rule in 921.12, 6A, Washington misconstrues the holding of --

MR. GODWIN: 6921.

Now, Judge, I can go further.

THE COURT: Let's not have the running back and forth in the courtroom. All the conversation in the courtroom --

MR. STELZER: There is something that needs to be placed, as a matter of fold. Mr. Sherman and Mr. Goldstein are consulting -- for legal issues -- with Carol Gottlieb and Mike Von Zamft from the Public Defender's Office. Not is it only improper, but it is against the Florida Code of Ethics. The Public Defenders have already, in this cause, filed a conflict-of-interests document indicating that they can't properly represent the defendant in this case, for the reason that they previously represented a witness in this case, Vanessa Brown, whose interests

MR. STELZER: There is no indication that the State is not going to call her in this hearing, number one.

Number two, the Public Defenders have never unfiled their Certificate of Confliction.

THE COURT: Here is the ruling of the Court: only the attorneys that have been appointed to represent the defendant or the State of Florida should be within the bar, and all those other persons in the bar should step outside and into the courtroom, Mr. Von Zamft and Ms. Gottlieb.

Only the attorneys, the Court Reporter, and the Clerk should be within the bar.

MR. STELZER: Does that include Detective Singleton?

THE COURT: He has been permitted to remain here.

MR. STELZER: I am essentially finished with Washington, where they point out a difference between "negating" and "mitigating" factors as to this. The only reason we want to show convictions of an offense, which do negate the mitigating facts that he has already admitted to.

THE COURT: I think it is proper. They should show the prior record.

MR. GOLDSTEIN: Insofar as the evidence to the

facts, he has not got a significant history of crime.

THE COURT: I think it is proper.

What's the next objection?

MR. GOLDSTEIN: I believe they indicated they are not going to go ahead with it.

MR. STELZER: We do not intend to ever, knowingly, create a great risk.

THE COURT: What about D?

MR. GOLDSTEIN: I believe it has been held on many, many occasions, the statute being strictly construed in favor of the defendant if there is any ambiguity. I would like to point out at this time that there is an ambiguity.

D reads: the capital felony was committed while the defendant was engaged (was an accomplice) in the commission (or attempt to commit) of flight after committing (or attempting to commit) any robbery, rape, or burglary.

THE COURT: Or the unlawful throwing, placing, or discharging of a destructive device or bomb.

MR. GOLDSTEIN: I would like to know whether or not, at this time, if the State intends to go forward with the rape -- that is, if the crime -- the murder -- was committed while performing a crime, or the murder was committed for the purposes of the robbery, so that

a felony involving the use or threat of violence to some person.

The State is not contending that the defendant has been convicted of another capital felony. The State is contending, and the evidence shows, that the defendant has been convicted of a felony involving the threat of violence to some person; namely, the felony conviction for the crime of attempted armed robbery, which involved the use or threat of force; namely a loaded a gun, placed at the head of the proprietor of the Zippy Mart, and therefore, aggravating circumstance number two clearly applies.

When you go to the mitigating side, there is a mitigating factor concerning the defendant's lack of significant prior history of crime. That clearly does not apply to this case -- the defendant having been convicted.

MR. GOLDSTEIN: Objection; it is improper argument.

THE COURT: Overruled.

MR. STELZER: That crime the defendant has admitted. He admitted this when he testified in this case, that he has been convicted of four separate crimes.

As far as aggravating circumstance number three,

sentence shouldn't be imposed upon you?

MR. GOLDSTEIN: I would say to the Court and request to the Court specifically to ask for the additional psychiatric evaluations that I requested prior to this hearing, before the Judge or the Court makes up its mind as to what the sentence should be, and I would also request a Pre-Sentence Investigation, Your Honor.

THE COURT: Does the State have a statement?

MR. STELZER: The Pre-Sentence is not required in this proceeding, where the only two alternatives are life imprisonment or death.

THE COURT: All psychiatric reports have been considered by the Court.

MR. GOLDSTEIN: I don't believe that is true, Judge. First of all, the P.S.I. is discretionary; it is not required. I will agree there. But I can't agree on the psychiatric reports.

THE COURT: There has been no indication to me that any opinion would be any different than the psychiatrists have already given, as to the evaluation of Mr. Stewart.

We have had three psychiatrists examine Mr. Stewart and all say that he is competent and all say he knew right from wrong at the time of the offense.

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He took the witness stand and answered the questions intelligently.

I will deny the request of Pre-Sentence Investigation.

Do you have anything to say to the Court, Mr. Stewart?

THE DEFENDANT: No.

THE COURT: Do you know of any legal reason why you feel sentence should not be imposed?

THE DEFENDANT: I don't know that much about law.

MR. STELZER: Judge, despite the sentence, you must state in passing that you are --

THE COURT: I will only base my decision and my findings upon the evidence that has been presented in this courtroom.

It is the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death, and this Court, after weighing and considering the aggravating and mitigating circumstances which have been presented, there are no mitigating circumstances, either statutorily or any testimony of facts and circumstances present at the advisory proceeding of the mitigating circumstances, to outweigh the aggravating circumstances.

I therefore agree and concur with the advisory

RECORDED
AUG 7 1979
RICHARD P. BRINKER
CLERK

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION (NESBITT)

CASE NO. 79-6621

STATE OF FLORIDA

Plaintiff

vs

ROY ALLEN STEWART

Defendant

SENTENCE

79 JUL 27 PM 4 05
CLERK CIRCUIT COURT
DADE COUNTY, FLA.
FILED FOR RECORD

THIS CAUSE came before the Court for trial by jury and after deliberations a verdict was rendered finding the defendant guilty of murder in the first degree, robbery, sexual battery and burglary.

Thereafter, a separate sentencing proceeding was conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment as authorized by Florida Statute 775.082. The jury duly deliberated and returned its advisory sentence. A majority recommended that this Court impose the sentence of death upon the defendant, ROY ALLEN STEWART.

Pursuant to Florida Statute 921.141(3) this Court is required to, and does consider each of the mitigating and aggravating circumstances involved herein and makes the following findings:

AGGRAVATION

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

FINDING:

The defendant Stewart was under a sentence of imprisonment when he committed the murder of which he has been convicted. He had been sentenced for attempted armed robbery and grand larceny on October 27, 1976. After serving approximately one year of the sentence, the defendant was paroled. On February 7, 1979, (some two weeks before the subject homicide) the defendant's parole was revoked for absconding the area of supervision, failing to report to

his parole agent, and failing to follow the advice and instructions of his parole agent. The defendant was thereupon ordered returned to the South Carolina Department of Corrections to serve the remainder of his six-year prison sentence.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

FINDING:

On January 11, 1976, Stewart committed the offense of attempted robbery. On October 27, 1976, Stewart was sentenced to six years of imprisonment for this offense.

The facts giving rise to the attempted robbery conviction were that Stewart went into a convenience store, demanded money and held a pistol to the storekeeper's head. He fled the scene before completing the robbery and was thereafter apprehended. The Court finds this offense involved the use or threat of violence to the person.

(c) Whether in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

FINDING:

There is no evidence that in committing the murder of which the defendant has been convicted he knowingly created a great risk of death to many persons.

(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any rape, or was an accomplice to that crime.[1]

FINDING:

The murder was committed while the defendant was engaged in the commission of or an attempt to commit rape (sexual battery) upon the victim, Margaret Haislip.

(e) Whether the murder of which the defendant was

1. The entire Section of F.S. 921.141(5)(d) provides as follows: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb."

convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

FINDING:

There is no evidence the murder for which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

FINDING:

The murder was committed during the commission of a robbery of the victim. The defendant admitted stealing a pocket watch from the victim. Stewart thereafter raided the victim's purse and tried to steal her car.

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

FINDING:

There is no evidence the murder was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

FINDING:

The victim, Margaret Haizlip, a woman of small physical stature, in her late seventies, was a pioneer of South Florida living in a small home across from Stewart's temporary residence. About 10:00 p. m. Mrs. Haizlip was out on her front porch and saw Stewart. She waived to him, invited him into her home and fixed him a sandwich. Shortly thereafter he went into her bathroom and stole a gold watch from the medicine cabinet. Mrs. Haizlip, after going into the bathroom confronted the defendant, apparently about the stolen watch, whereupon Stewart beat and pummelled Mrs. Haizlip unmercifully about her ribs, face and head. While so doing, the defendant was tearing the clothing and ultimately the underwear from her body. As she lay on the floor, bleeding from her face, moaning and "making noises", the defendant forcibly had sexual intercourse with her in a manner

so vicious so as to tear her vagina. The defendant thereupon fastened a cord with an iron attached to it around her neck, pulled tightly on the cord and thereby strangled her leaving a ligature mark on her neck.

The medical examiner testified the victim suffered eight broken ribs, multiple contusions, and her larynx was broken. A bite mark was identified on her thigh, and what appeared to be a bite mark was on her breast. There were blood stains and disarray in the living room and bedroom area of her house, indicating the victim was fighting and running for her life. The defendant left the victim at the scene with blood on his hands.[2] The murder of Margaret Haizlip was vicious and brutal and was committed in an especially ghastly, heinous, atrocious and cruel manner.

MITIGATION

(a) Whether the defendant has no significant history of prior criminal activity.

FINDING:

The defendant Stewart does have a significant history of prior criminal activity since 1975, part of which has been set forth in detail in aggravation finding (b). In addition to that prior crime which involved the use or threat of violence to the person, the defendant was also convicted in 1975 for housebreaking and larceny.

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

FINDING:

There is no evidence that Stewart was under the influence of extreme mental or emotional disturbance during the commission of the murder. The defendant prior to trial was evaluated by three psychiatrists. They were all of the opinion that at the time of the

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2. The cavalier and sanguinary attitude of Stewart toward the victim is apparent from his actions of leaving the victim's home with blood on his hands, trying to steal her car, then washing his hands off at a nearby service station and thereafter going to a nearby Pub for "last call for drinks".

offense the defendant had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law.[3]

(c) Whether the victim was a participant in the defendant's conduct or consented to the act(s).

FINDING:

The victim at no time and in no way consented to nor participated in the conduct of the defendant's acts.

(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

FINDING:

The defendant was not an accomplice to the murder. By his own confession, he was the only one in the victim's house and the only one who inflicted all the brutalities upon her.

(e) Whether the defendant acted under extreme duress or under the substantial domination of another person.

FINDING:

There is no evidence that Stewart's actions were a result of his being under any form of duress or substantial domination of another.

(f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.

FINDING:

There is no evidence that Stewart's capacity to appreciate the criminality of the murder he committed was diminished or impaired in any way. [refer to mitigation finding (b).]

(g) The age of the defendant at the time of the crime.

FINDING:

Stewart was twenty-three years of age at the time of the crime. He had left school, had been married and was working as a roofer. Certainly he was well into his majority. Therefore, he was not of such tender years that his age would be a mitigating factor.

3. Additionally, in his confession Stewart related the details of the homicide to the arresting officer in a calm, rational and detailed manner.

The Court finds that there are no mitigating factors, either statutory or non-statutory, which apply in this case. The Court has reviewed the entire record in this case to determine whether there might possibly exist anything whatsoever of a non-statutory mitigating nature that could be considered by this Court in mitigation of the sentence, but the Court was unable to find any mitigating factors.

This Court has used as a basis for consideration in imposing sentence no information whatsoever not known to the defendant and/or his counsel of record. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

Upon the preceding specific findings of fact, the Court bases its sentence. It is the opinion of this Court that there are sufficient aggravating circumstances existing to justify the sentence of death. This Court, after weighing and considering the aggravating and mitigating circumstances, is of the opinion that no mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the advisory proceeding exist to outweigh the aggravating circumstances. This Court, therefore, agrees and concurs with the advisory sentence and recommendation rendered by the trial jury.

It is therefore the sentence of this Court that as to Count I of the indictment you, ROY ALLEN STEWART, be adjudicated guilty of murder in the first degree and that you be sentenced to death for the murder of Margaret Haizlip.

It is further ordered that you, ROY ALLEN STEWART, be taken by the proper authority to Florida State Prison and there be kept in close confinement until the date of your execution be set.

It is further ordered that on such scheduled date you shall be put to death by having electrical current pass through your body in such amounts and frequency until you are rendered dead. You, ROY ALLEN STEWART, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida.

As to Count II of the indictment, robbery, it is the

judgment and sentence of this Court that you be adjudicated guilty and sentenced to a term of 30 years of imprisonment in the State Prison.

As to Count III of the indictment, sexual battery, it is the judgment and sentence of this Court that you be adjudicated guilty and sentenced to a term of life imprisonment in the State Prison.[4]

As to Count IV of the indictment, burglary, you are adjudicated guilty and sentenced to a term of 15 years of imprisonment in the State Prison.

Each of these sentences is to be served consecutive to each other, and consecutive to Count I of the indictment.

You are further advised that as to the judgments and sentences imposed in Count I, Count II, Count III, and Count IV you have the right to appeal within 30 days from the date of these proceedings. You are further advised that you have the right to the assistance of counsel in the filing and preparation of your appeal and upon your request and the showing that you are entitled to an attorney at the expense of the State, and attorney will be appointed to represent you.

DONE AND ORDERED this 26th day of July, 1979, at Miami, Dade County, Florida.

Lenore C. Nesbitt

LENORE C. NESBITT, Circuit Judge

4. This Court is aware of and has taken into consideration the recent decision of the Supreme Court of Florida in the case of State of Florida v. Alfred Jerome Pinder, Case No. 55,369, Opinion filed July 5, 1979. The Court makes the specific finding that two separate sentences can be imposed for murder and sexual battery since there is ample evidence in the record to indicate that the defendant murdered the victim in a premeditated manner, that is to say with a fully formed, conscious intent to cause the victim's death.

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ceding subsection concerning direct contempts, shall be prosecuted in the following manner:

(1) *Order to Show Cause.* The judge, of his own motion or upon affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring him to appear before the court to show cause why he should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant.

(2) *Motions; Answer.* The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.

(3) *Order of Arrest; Bail.* The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to bail in the manner provided by law in criminal cases.

(4) *Arraignment; Hearing.* The defendant may be arraigned at the time of the hearing, or prior thereto upon his request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense.

All issues of law and fact shall be heard and determined by the judge.

(5) *Disqualification of Judge.* If the contempt charged involves disrespect to or criticism of a judge he shall disqualify himself from presiding at the hearing. Another judge shall be designated by the Chief Justice of the Supreme Court.

(6) *Verdict; Judgment.* At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

(7) *The Sentence; Indirect Contempt.* Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against him and inquire as to whether he has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

Committee Note

Same as prior rule.

XVII. POST-CONVICTION RELIEF

Rule 3.850. Motion to Vacate, Set Aside or Correct Sentence; Hearing; Appeal (See Rule 3.987 for form)

A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.

A motion for such relief may be made at any time. The motion shall be under oath and include the following information:

(a) The judgment or sentence under attack and the court which rendered the same;

(b) Whether there was an appeal from the judgment or sentence and the disposition thereof;

(c) Whether a previous post-conviction motion has been filed, and if so, how many;

(d) The nature of the relief sought;

(e) A brief statement of the facts (rather than conclusions) relied upon in support of the motion.

The court will refuse to receive any motion filed pursuant to this rule which is not in substantial compliance with the requirements hereof.

If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion and the files and records of the

case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for post-conviction relief shall include a statement that the movant has the right to appeal within thirty days of the rendition of the order. The prisoner may file a motion for rehearing of an order denying a motion under this rule within fifteen days of the date of service of the order. The clerk of the court shall promptly serve upon the prisoner a copy of any order denying a motion for post-conviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.

An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247); Dec. 22, 1977, effective Jan. 1, 1978 (353 So.2d 552).

Committee Note

1972 Revision. Same as prior rule. Former Rule 3.860, previously deleted, now found in Article 18, The Florida Bar Integration Rules.

1977 Amendment (343 So.2d 1247). Nothing has been taken from proposed Rule 3.850. Additions have been made. The committee proceeded on the theory that generally the motions coming under the purview of the rule were filed by prisoners and will be considered ex parte.

The proposed amendment contemplates that in those cases where the trial court found the movant entitled to some relief, the State Attorney would be noticed and given an opportunity to be heard. The rule further contemplates that if the appellate court reverses, it would do so with directions to conduct a hearing with notice to all parties.

(a), (b), (c), (d), (e)

The committee was of the opinion that the motion should contain the minimum prerequisites indicated in the lettered portions to permit the trial court to quickly ascertain whether or not the motion was entitled to consideration, and if not, provide for its return to the movant as unacceptable. This procedure is similar to Federal rules dealing with post-conviction motions.

The committee perceives that denial of a motion will either be based on the insufficiency of the motion itself or on the basis of the file or record which the trial court will have before it. The proposal provides for a simplified expeditious disposition of appeals in such cases. It is to be noted, however, that in those cases where the record is relied upon as a basis for denial of the motion, it may in exceptional cases involve a substantial record but the advantages of this procedure seem to justify coping with the unusual or exceptional case. It is the opinion of the committee that trial courts will in any order of denial based upon the insufficiency of the motion or on the face of the record, set forth specifically the basis of the court's ruling with sufficient specificity to delineate the issue for the benefit of the appellate courts.

The committee thought that the provision permitting ex parte denial of a motion based on the face of the record was appropriate inasmuch as the movant was granted an opportunity for rehearing in which he could point out any errors the court may have made, thus providing sufficient safeguards to insure consideration of the prisoner's contentions.

The prisoner or movant's motion for rehearing will be a part of the record on appeal, thereby alerting the appellate court to the movant's dissatisfaction with the trial court's ruling.

XVIII. FORMS

Rule 3.985. Standard Jury Instructions

The forms of Florida Standard Jury Instructions in Criminal Cases published by The Florida Bar pursuant to authority of the court may be used by the trial judges of this State in charging the jury in every criminal case to the extent that the forms are applicable, unless the trial judge shall determine that an applicable form of instruction is erroneous or inadequate, in which event he shall modify or amend such form or give such other instruction as the trial judge shall determine to be necessary accurately and sufficiently to instruct the jury in the circumstances of the case; and, in such event, the trial judge shall state on the record or in a separate order the respect in which he finds the standard form erroneous or inadequate and the legal basis of his finding. Similarly, in all circumstances in which the notes accompanying the Florida Standard Jury Instructions in Criminal Cases contain a recommendation that a certain type of instruction not be given, the trial judge may follow such recommendation unless he shall determine that the giving of such an instruction is necessary accurately and sufficiently to instruct the jury, in which event he shall give such

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FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-6187

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROY ALLEN STEWART,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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I

STATEMENT OF THE CASE

The Defendant, Roy Allen Stewart was indicted, convicted and sentenced to death arising from his brutal rape, robbery and murder of an elderly women in her home in Miami, Florida. See, Stewart v. State, 420 So.2d 862 (Fla. 1982). On direct review to the Florida Supreme Court, the Defendant's convictions and sentence of death were affirmed. Id.

Relative to the present petition, prior to the Defendant's trial, the Defendant was examine by three (3) court appointed psychiatrists Id. at 864. Nevertheless, defense counsel persisted in asking the Florida Trial Court for the appointment of yet other psychiatrist to examine the Defendant for purposes of presenting evidence of statutory mitigation under Section 921.141(6)(b), (e) and (f), which relate to the capacity of the Defendant to appreciate the criminality of his conduct and whether or not the Defendant was under emotional "duress" or "mental or emotional disturbance". The three (3) court appointed psychiatrists found the Defendant competent to stand trial and able to assist in his defense. One of the psychiatrists, Jacobson, specifically found that the Defendant did appreciate the criminality of his conduct within the meaning of Section 921.141(6)(b) or (f). See Petitioner's Appendix at pages 25-42. All of the medical reports which were rendered well before the trial, contained extensive recitations of the Defendant's childhood, family and other background.

Relative to this petition, just prior to the sentencing phase, the Defendant's trial counsel moved again for a con-

The State's trial court denied the Defendant's Motion for a Continuance finding that further psychological examinations were unnecessary and finding specifically that the Defendant had two (2) trial attorneys preparing the present case for more than a month prior to trial. 420 So.2d at 864.

Finally, because counsel vigorously argued that he had been denied the effective assistance of counsel because of the trial court denying a Motion for a continuance at the time of the sentencing phase, the Supreme Court of Florida considered and rejected such a claim on direct appeal. Generally, in Florida, ineffectiveness assistance of counsel claims are addressed through a Motion for Post Conviction Relief filed in the trial court. See, Knight v. State, 394 So.2d 997 (Fla. 1981).

II

SUMMARY OF ARGUMENT

The Defendant has failed to present a substantial federal question arising from the opinion of the Supreme Court of Florida in applying the death penalty to the Defendant.

III

ARGUMENT

The Defendant makes three (3) arguments urging this Court to exercise its discretionary jurisdiction herein. First of all, the Defendant contends that the denial of more court appointed psychiatrists to examine the Defendant again denied counsel the right to investigate and present relevant mitigating circumstances under Lockett v. Ohio, 438 U.S. 586 (1978). Thus, the Defendant contends that the death penalty herein was arbitrary applied under Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Secondly, the Defendant makes a similar argument with regard to the denial of his counsel's request for a continuance. Finally, the Defendant asserts that the Supreme Court of Florida in applying state rules and procedures to the Defendant's claim of ineffective assistance of counsel constitutes an arbitrary and unreasonable departure from normal state procedures and thus a denial of due process.

First of all, the Defendant's premise for asserting jurisdiction herein is erroneous. The Defendant was examined by three (3) court appointed psychiatrists who certainly could have been asked any questions by the defense counsel at any time prior to trial or during trial as to the evidence of the Defendant's duress or emotional disturbance in the present case. 420 So.2d at 864. In fact, one of the psychiatrists did consider and reject any evidence that the Defendant did not appreciate the criminality of his conduct as a statutory mitigating circumstance. Probably, defense counsel did not pursue the three (3) court appointed psychiatrists' testimony because their testimony would have clearly revealed that the Defendant was just fine when he brutally raped robbed and murdered the elderly pioneer

The trial court's denial of the Defendant's Motion for a Continuance is also sounded. A summary allegation that counsel had insufficient time to prepare for trial does not raise a substantial federal question. See, Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970); United States v. Gray, 565 F.2d 881, at 887 (5th Cir. 1978), cert. den., 435 U.S. 955 (1978) (time spent in preparation in and of itself is not a showing of ineffective counsel). Further, as with the Defendant's central contention above regarding the necessity of additional psychiatric examinations, the additional evidence sought by the Defendant herein was merely cumulative to that already before the trial court and jury.

In the Defendant's final contention, he complains that the Supreme Court of Florida considered his ineffective assistance of counsel claim on direct review contrary to its normal procedure of requiring a separate Rule 3.850 Florida Rules of Criminal Procedure proceeding in the trial court. See, Knight v. State, 394 So.2d 997 (Fla. 1981). That the Florida Supreme Court choose to address the Defendant's complaint that he was denied effective assistance of counsel on direct review rather then under the Florida's separate procedure under Rule 3.850, is plainly a question of State law and procedure and therefore does not present a substantial federal constitutional question. See, e.g., Rose v. Hodges, 423 U.S. 19 (1975).

IV

CONCLUSION

WHEREFORE, on the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will deny the present Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED, on this 21st day of March, 1983, at Miami, Dade County, Florida.

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